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Supreme Court of the United States

OCTOBER TERM, 1980

No. 79-1357

THE AMERICAN OIL COMPANY,

Petitioner,

vs.

GEORGE ARNOTT,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioner, The American Oil Company ("Amoco"), respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered on December 10, 1979.

OPINIONS BELOW

The opinion of the panel of the Court of Appeals* is reported at 609 F.2d 873 (8th Cir. 1979) and is set forth in the Appendix at 1a. The order denying petitioner's motion for rehearing and suggestions for hearing en banc is set forth in the Appendix at 39a. The judgment of the United States District Court for the District of South Dakota is set forth in the Appendix at 43a.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

A decision of the Court of Appeals for the Eighth Circuit was entered on October 24, 1979, on the condition that plaintiff Arnott file a remittitur of all damages exceeding $125,000. A timely petition for rehearing and suggestions for rehearing en banc was denied on December 3, 1979. The remittitur was filed and the Court of Appeals entered judgment on December 6, 1979.

* The panel was composed of Judges Heaney, Bright, and Stephenson.

QUESTIONS PRESENTED

I. Whether it was proper for the Panel to engage in speculation to determine the meaning of an ambiguous general jury verdict where there are four different and independent causes of action (three common law, and one federal § 1 Sherman Act).

II. Whether it was proper for the Panel to find that Amoco misrepresented the term of the lease of a service station when that was not an issue presented to or considered by the District Court.

III. Whether it was proper for the District Court to instruct the jury that as a matter of law, a fiduciary relationship existed between defendant-lessor Amoco and plaintiff-lessee Arnott when the law of South Dakota was to the contrary.

IV. Whether it was proper for the Panel and the District Court to ignore the law of South Dakota SDCL 53-3-5, which specifically precludes a person as plaintiff-Arnott who accepts benefits under an agreement from repudiating the accompanying obligation of that agreement.

V. Whether it was proper for the Panel to find that Amoco engaged in price fixing in violation of § 1 of the Sherman Act when there was no proof of a combination, contract or conspiracy.

STATEMENT OF THE CASE

This petition seeks review of an unprecedented decision of the United States Court of Appeals for the Eighth Circuit which permitted the panel to speculate to determine the meaning of an ambiguous general jury verdict.

On May 15, 1974, plaintiff Arnott instituted this action which as amended consisted of seven counts, three of which were voluntarily dismissed, and the case was submitted to the jury on the following four causes of action: (1) Fraud and misrepresentation in that Amoco allegedly made false, fraudulent, and deceitful misrepresentations to Arnott concerning Amoco's promotions, equipment, products, and the profitability of the installation of a car wash; (2) Breach of fiduciary duty in that Amoco allegedly had failed to supply Arnott with sufficient gasoline to enable him to operate economically 24 hours a day, and termination of the lease therefor constituted such breach; (3) Debt owing in that Amoco allegedly owed $395.75 to Arnott for attorney fees; and (4) Federal antitrust alleging that Amoco conspired to fix plaintiff's retail price of gasoline in violation of § 1 of the Sherman Act.

BRIEF STATEMENT OF FACTS

The Original Lease of February 18, 1972

On February 18, 1972, George Arnott (Lessee) and American Oil Company (Lessor) executed a written lease of an interstate service station in Sioux Falls, South Dakota, for a term of one (1) year only commencing February 19, 1972, and expiring on February 18, 1973. There was no provision for renewal. As a rental for such service station, Arnott agreed to pay Amoco ". . . a sum equal to 1.8¢ per gallon on *all* gasoline . . . delivered to said service station for resale." The lease further provided that the station would be operated twenty-four (24) hours a day seven (7) days a week.

The Lease Amendment of June 1, 1972

The parties subsequently entered into a Lease Rider amending such lease effective June 1, 1972. The amendment set forth gasoline gallonage volumes for each month; provided that lessee *Arnott would not have to pay rent on gallons in excess of such amounts* and further provided that the lessee *Arnott would be paid*: (1) *$183.69 each month for operating 24 hours a day*; and (2) a second $183.69 per month for having installed a car wash and to reimburse lessee for the cost of same. Lessee was paid the above amounts.

The New Lease of February 19, 1973

On December 8, 1972, the parties entered into a new lease of the service station effective February 19, 1973, for a one (1) year term only. There was no provision for renewal. The automatic renewal provision was purposely stricken out by the parties. The new lease also provided

that the service station would be operated twenty-four (24) hours a day seven days a week.

The Lease Amendment of June 1, 1973

The new lease was amended by the parties effective June 1, 1973. The amendment provided for a total annual gasoline gallonage volume base for the service station of 565,400 gallons, set forth specific gasoline gallonage volumes for each month, limited lessee's monthly rental payments to such volumes, and provided that lessee would be paid $183.69 each month for operating 24-hours a day.

The Lease Cancellation

Arnott failed to operate the station on a 24-hour basis during the month of July 1973 and until August 6, 1973, when he vacated the station. Amoco's payments to Arnott to stay open 24 hours a day are not in dispute. Arnott admitted to receiving the $183.69 each month pursuant to the Lease Amendments, including payment for the months of July and August 1973 (Tr. 59, 140).

On July 17, 1973, Arnott voluntarily cancelled his lease with Amoco—advising Amoco's sales representative Clinton Bucklin that he was tired of having trouble maintaining good help; tired of the long hours, wanted to spend more time with his family; and that he had another job lined up at the Ben Hur Ford Agency. (Tr. 323-324, 437-440). Arnott on July 16, 1973, had made application for the Ben Hur job (Tr. 470).

In view of such cancellation Amoco on July 26, 1973, advised Arnott *inter alia*, as follows:

> "This letter is to inform you, based on your lease cancellation agreement signed on July 17, 1973,

> that we will be at the service station you lease from us on Monday, August 6th to take possession of the property." (Tr. 100)

Arnott, after he had signed the lease cancellation agreement retained Attorney M. F. Pieplow to represent him (Tr. 165). Attorney Pieplow was at the service station on Monday, August 6th and advised Amoco that closing of the station would be considered involuntary. Amoco, thereafter on August 6th, gave Lessee and his attorney written notice of Amoco's intent to cancel the lease effective September 5, 1973, for failure to maintain a 24-hour operation as required by paragraph 2 of the said lease, unless Lessee cured such default by such date. The notice provided *inter alia*, as follows:

> "You have been violating the conditions of said paragraph 2 in that you have substantially curtailed your hours of operation. Paragraph 9(a) of the lease gives our Company the right to cancel said lease if you fail to perform any of the covenants provided for in paragraph 1 through 8 inclusive; said cancellation to become effective by our giving you thirty (30) days written notice of such cancellation. You may, therefore, consider this letter written notice of our intent to cancel your lease effective September 5, 1973, unless the default above stated is completely remedied and we are notified thereof prior to said date or in lieu thereof, you have made satisfactory arrangements with Mr. Clint Bucklin." (Tr. 163-4).

Instead of curing such default, Arnott made the following counteroffer:

> "Please be advised that Mr. Arnott is ready, willing, and able to perform all lease arrangements, including 24-hour operation, upon the assurance of the American Oil Company that it will supply him with all the gasoline and other petroleum products that he can sell." (Tr. 466-7)

Arnott further waived the thirty (30) day period, i.e., to September 5, he was granted to correct the default, and vacated the station on August 6, 1973.

The Supply of Gasoline*

Arnott at all times had a supply of gasoline in excess of the monthly amount agreed to in the Lease Riders. For the month of July 1973, Arnott agreed to operate the station 24 hours a day on a volume base of 72,900 gallons (Tr. 144). Arnott sold some 79,788 gallons in July 1973 (Tr. 135, 442). The total amount of gasoline delivered to Arnott's station in July 1973 was 96,555 gallons and at the end of July, Arnott had some 33,127 gallons of gasoline on hand (Tr. 428-9).

It is undisputed that on June 13, 1973, the United States government froze the prices (wholesale and retail) of all petroleum products including gasoline and by law, gasoline prices could not be *moved*, up or down. It is further conceded that such price freeze of gasoline was still in effect at the time Arnott's lease was cancelled on August 6, 1973 (Tr. 791).

THE OPINIONS OF THE COURTS BELOW

1. The District Court

On August 28, 1978, the jury trial commenced. At the close of plaintiff's case in chief, Amoco's motion for a directed verdict on all issues was denied. On September 5, 1978, the jury was charged and the case submitted.

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* The Panel's statement on page 8 of its opinion that Arnott ". . . closed the station because it was not profitable to remain open" is a clear misstatement of the facts even when viewed most favorably to plaintiff. Arnott specifically testified that operating the station on a 24-hour basis *was* profitable. See Tr. 135, 144.

The special interrogatories with respect to liability only, were answered by the jury as follows:

"Did you find Defendant American Oil Company liable based on:

			(yes) or (no)
a.	False and fraudulent representations	ANSWER	Yes
b.	Breach of fiduciary duty	ANSWER	Yes
c.	Violation of antitrust laws	ANSWER	Yes
d.	Atty's. fees in State Court Action	ANSWER	Yes

The jury returned a general verdict in favor of Arnott and against Amoco in the *lump sum* amount of $100,000 actual or compensatory damages and $25,000 punitive damages. The lump sum general jury verdict of $100,000 was trebled by the district court to $300,000 plus $25,000 punitive damages and attorney fees in the amount of $7,595.70 and costs of $704.64 for a total amount of $333,300.34. Amoco's motion for a directed verdict, for judgment notwithstanding the verdict, and for a new trial, was denied on January 4, 1979.

2. The Panel

On October 24, 1979, the panel affirmed the district court upon the condition that plaintiff Arnott file a remittitur of all damages exceeding $125,000 plus interest and costs. Arnott filed such remittitur and on December 6, 1979, the panel affirmed the judgment of the district court in the reduced amount of $125,000.

REASONS FOR GRANTING THE WRIT

I.

WHERE A JURY VERDICT IS AMBIGUOUS, IT IS IMPROPER FOR THE PANEL TO ENGAGE IN SPECULATION TO DETERMINE WHAT THE JURY MEANT.

The jury returned a general verdict in favor of Arnott and against Amoco in the lump sum of $100,000 actual or compensatory damages and punitive and exemplary damages of $25,000. The jury further answered special interrogatories with respect to liability only against Amoco:

> "Did you find Defendant American Oil Company liable based on:

		(Yes or No)
a. False and fraudulent representations	ANSWER	Yes
b. Breach of fiduciary duty	ANSWER	Yes
c. Violation of antitrust laws	ANSWER	Yes
d. Atty's. fees in State Court Action	ANSWER	Yes

The District Court trebled the $100,000 actual or compensatory damages in view of the jury's finding of liability under the antitrust laws.

As stated by the panel (App. 28a):

> "It would be purely speculative to assume that the entire general verdict of $100,000 was awarded as damages resulting from violation of the antitrust laws. We are, however, satisfied that the evidence amply supports an award of $100,000 actual and compensatory damages on any of the three counts of (1) false and fraudulent representations, (2) breach of fiduciary duty, and (3) violation of the antitrust laws. We are also persuaded that the jury's award to Arnott and against Amoco of punitive and exemplary damages in the sum of $25,000 is supported by the record."

Four counts, however, were submitted to the jury not three. By no stretch of the imagination can it be said ". . . that the evidence amply supports an award of $100,000 actual and compensatory damages . . ." on such *fourth count*—debt owing for payment of attorney fees. The evidence of the amount of such fees was $393.75.

The record reveals that if Amoco is liable for the attorney fees debt, it is liable for only $393.75, thus presenting a conflict between liability findings and the award of $100,000 damages. As the court stated in *Hatfield v. Seaboard Airline Railroad*, 396 F.2d 721, 724 (5th Cir. 1968):

> "Such a conflict cannot be resolved by an appellate court assuming that the liability issues were answered correctly and that only the damage issue was incorrectly decided. Substantial justice and each party's right to a jury trial requires a new trial of all the issues."

In any event, it is not whether the evidence can support any such counts, but whether the general verdict requires the court to engage in speculation to determine its meaning.

It cannot be determined whether the verdict regarding damages relates to: A. Just one cause of action only of the four, and then which one of the four; or B. Just two (2) causes of action only of the four, and then which two (2) of the four; or C. Just three (3) causes of action only of the four, and then which three (3) of the four; or D. To all four (4) causes of action and if so

whether such damages were to be divided equally or unequally between the (1) fraud, (2) breach of fiduciary duty, (3) nonpayment of attorney fees, and (4) antitrust causes of action. (This division problem also applies to B and C.) This problem, contrary to the panel's opinion, was not restricted only to the actual damages of $100,000, but also exists as to the punitive and exemplary damages of $25,000. A judgment cannot be entered upon such a verdict when the jury's intention is unclear and ambiguous.

A. The Panel's Decision Conflicts With Decisions Of The Court Of Appeals For The Third And Fifth Circuits.

As the court stated in *Rea v. Ford Motor Co.*, 497 F.2d 577 (3rd Cir. 1974), *cert. denied*, 419 U.S. 868 (1974):

> "We note that we cannot be certain of how much of the lump sum damages stated by the jury in answer to Question 9 was intended to be allocated to the price-fixing claim. We are not bound by the district court's attribution of $34,200.00 in damages to the price-fixing claim (n. 32 at p. 592).
>
> . . . [W]e cannot be sure whether the jury's affirmative answer to Question 6, finding a "contract, combination or conspiracy . . . which unreasonably restrained interstate trade or commerce in Ford motor vehicles at the retail level," was based on this price-fixing claim or on the claim arising out of the operation of company-owned outlets described above. For this reason, a new trial is required on this claim (*Id.* at p. 591).

As the court held in *Royal Netherlands Steamship Co. v. Strachan Shipping Co.*, 362 F.2d 691, 694 (5th Cir. 1966), *cert. denied*, 385 U.S. 1004 (1967):

> "Where the answers of the jury, upon which the court's judgment depends, are so ambiguous, or so conflicting and inconsistent that they cannot be reconciled, a special verdict will not support a judgment and the cause must be reversed for a new trial."

The cases relied upon by the panel are completely inapposite. The issue here is not of waiver or failure to object, but of the panel's and the district court's resort to speculation to determine what the jury meant. The panel partially recognizes this when it states (App. 28a) that "It would be purely speculative to assume that the entire general verdict amount of $100,000 was awarded as damages resulting from violation of the antitrust laws." However, it was just as speculative for the panel to thereafter assume that *any* amount of the general verdict of $100,000 was awarded as damages resulting from violation of the antitrust laws. The jury could have awarded the entire amount for the fourth cause of action—nonpayment of debt owing for attorney fees.

II.

IT WAS IMPROPER FOR THE DISTRICT COURT TO INSTRUCT THE JURY THAT AS A MATTER OF LAW A FIDUCIARY RELATIONSHIP EXISTED BETWEEN LESSOR-AMOCO AND LESSEE-ARNOTT WHEN THE LAW OF SOUTH DAKOTA WAS TO THE CONTRARY.

The district court's instruction that as a matter of law a fidiciary relationship existed between defendant Amoco and plaintiff Arnott was erroneous, highly prejudicial, and a misstatement of the law of South Dakota.* No court has ever before held that a fiduciary relationship exists in a situation such as this.

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* The Court's instruction was as follows:

"You are instructed that a fiduciary relationship existed between the Defendant and the Plaintiff. A fiduciary

(Footnote continued on following page)

As Judge Bright of the panel states in his dissenting opinion (App. 29a):

> "These strictures, though appropriate in the case of a trustee, should not be applied to a commercial lessor. Rather, the lessor should be held to the rules governing contracts in general. It is true that a franchisor might have other duties. But only if the evidence shows a relationship between lessor and lessee extending significantly into other areas is it necessary or desirable to characterize their arrangement as a franchise. Even then one must determine which of the full gamut of fiduciary responsibilities should be required of the franchisor. See *Eaton, Yale & Towne, Inc. v. Sherman Industrial Equip. Co.*, 316 F. Supp. 435, 455 (E. D. Mo. 1970). In my view both the district court and the majority erred in deciding this matter; in fact, South Dakota law does not justify the conclusion they reach."

* * *

> "The parties in this case entered into a business relationship, not a fiduciary relationship . . . . I believe the court committed error when, on the facts of this case, it instructed the jury that a strict fiduciary relationship existed between Arnott and Amoco."

Arnott's claim for breach of fiduciary duty is that Amoco did not supply him with a sufficient quantity of

Footnote Continued

relationship is one founded on trust or confidence placed by one person in the integrity and fidelity of another person. Out of such a relation, the law requires that neither party exert undue influence or pressure upon the other, take selfish advantage of his trust or deal with the subject matter of the trust in such a way as to benefit himself or to prejudice the other except in the exercise of the utmost good faith and with the full knowledge and consent of the other person involved."

gasoline to enable him to operate economically 24 hours a day in compliance with the lease.*

There was no requirement that Arnott buy any gasoline from Lessor and there was no agreement that Lessor-Amoco would supply any gasoline to such station. In the original lease Arnott had agreed to pay 1.8 cents per gallon as rent for such property on all gasoline sold. The Lease Riders amending such lease however, set forth gasoline gallonage volumes for each month and provided that Lessee-Arnott would not have to pay rent on gallons in excess of such amounts. Also, contrary to the original lease, the lease amendment provided that Arnott *would be paid $183.69 each month* by the lessor for operating 24 hours a day.

Arnott testified that he had enough gasoline to maintain a 24-hour operation and that he operated 24 hours a day for all such prior months including April 1972 when he sold 53,495 gallons of gasoline; December 1972 when he sold 39,457 gallons; April 1973 when he sold 48,743 gallons; and June 1973 when he sold 76,607 gallons (Exhibit I). The record evidence conclusively establishes and it is not controverted that Arnott agreed to operate 24 hours a day for July 1973 on a volume base of 72,900

* Arnott's claim is set forth in paragraphs XII & XIII of his Amended Complaint as follows:

> XII. That Defendant agreed, as an implied condition of the lease, to supply Plaintiff with sufficient quantities of gasoline and petroleum products to enable him to economically maintain a 24-hour operation . . .
>
> XIII. That Defendant's actions and conduct in terminating Plaintiff's lease for failure to maintain 24-hour operations, while at the same time failing to provide Plaintiff with sufficient gasoline and petroleum products to enable him to economically maintain those hours of operation constituted a breach of fiduciary duty . . .

gallons; that he sold 79,788 gallons in July 1973; that he never ran out of gasoline; and that he had some 33,127 gallons of gasoline on hand at the end of July (Exhibit H).

Q. Would you read paragraph 4.

The Court: This is paragraph 4 of what?

Mr. Nimick: Of the Lease Rider Agreement to the lease.

Q. Just read it, Mr. Arnott.

A. It says: (Reading) The Lessee agrees that the monthly rental refund calculated as per paragraph 1 above shall be subject to a minimum of $183.69 as it pertains to each full calendar month, during the original term of this lease or any renewals thereof, in which the Lessee keeps the premises open 24 hours.

Q. And you in fact did receive those payments?

A. Yes. (Tr. 135).

Q. But yet in your lease rider agreement dated in April of 1973, you agreed to maintain 24-hour operation based upon the gallonage provided in that rider?

A. Yes. (Tr. 167).

Q. Mr. Arnott, this is the lease rider agreement you have signed. Now, will you tell the jury what you have agreed to for June and July of 1973 in that?

Q. Tell the jury.

A. The gallonage for June of '73 as per the lease is 72,500; July of '73, it would be 72,000. (Tr. 168-169).

Q. And you agreed to open it 24 hours for 72,900 gallons?

A. Yes. (Tr. 170).

Q. According to the records, Mr. Arnott, in June of 1972, you sold 64,461 gallons of gas, and in June of 1973, you sold 76,607 gallons. Were both of those months profitable for you?

A. Yes, they were.

Q. The month of July of 1973, according to the records, you sold some 79,788 gallons of gas; was that a profitable month?

A. Yes, it would have been. (Tr. 135).

Q. And that is the month that you determined to close your station?

A. That would have been the month that I determined to discontinue 24-hour operation.

Q. But yet the year before in June, with 64,461 gallons, you found it profitable to be open 24 hours a day?

A. Yes, I did.

Q. The same was true in December of 1972, when you sold 39,457 gallons?

A. Yes.

Q. Now, for the year 1972—or actually it would be eleven and a half months, I guess, or ten and a half months, according to the records, you sold 659,-250 gallons; you found that to be profitable?

A. Yes.

Q. On a 24-hour basis?

A. Yes.

Q. For the period of time you were in the station in 1973, you sold 515,301 gallons, and you found that not to be profitable?

A. No, I didn't find it to be profitable.

Q. On a 24-hour basis?

A. What?

Q. On a 24-hour basis?

A. No; it was profitable. (Tr. 136-137).

Q. In any event, Mr. Arnott, you did agree to stay open if you were provided the gallonage set forth in the rider dated April of 1973?

A. Yes, I did. (Tr. 144).

Arnott does not contest the fact that he accepted the benefits of the transaction pursuant to the lease amendments: (1) he paid rent not on *all* gasoline delivered to the station as the original lease required, but only on a set limited amount of such gasoline per

month and no rent on gallonage in excess thereof, and (2) *he was paid $183.69 each month* to operate the station 24 hours a day as opposed to the original lease that required 24-hour operation with *no* payment therefor.

The panel majority and the district court refused to apply the law of South Dakota, SDCL* 53-3-5, which specifically provides that Arnott is bound by all lease provisions including the one-year term and the 24-hour obligation by voluntary acceptance of the benefits thereunder. (App. 53a)

The holding by the South Dakota Supreme Court in *Schutterle v. Schutterle*, 260 N.W.2d 341, 350 (S.D. 1977) comprehensively covers the factual situation presented in the present case. In *Schutterle* the court stated:

> "Whatever doubts one might have concerning appellant's understanding of the legal effect of the terms of the agreement or her knowledge of the nature and extent of Ralph's property on the date the agreement was signed, then certainly by insisting in April of 1971 that Ralph had no interest in her Iowa farmland and in signing the real estate sales contract containing the above-quoted provisions, and by accepting the proceeds of the sale of the Iowa real estate, appellant ratified the terms of the agreement and will not now be heard to attack it."

> "A voluntary acceptance of the benefit of a transaction is equivalent to a consent to all the obligations arising from it so far as the facts are known or ought to be known to the person accepting."

In *Strom v. Buholz*, 73 S.D. 583, 46 N.W.2d 912, this court stated that:

"This statute [SDCL 53-3-5] is a declaration of the equity rule which prevents the party benefitted

* SDCL refers to South Dakota Compiled Laws.

from questioning the validity and effectiveness of a matter of transaction insofar as it imposes a liability or obligation upon him. It precludes one who accepts the benefit from repudiating the accompanying obligations. The rule in effect denies the right to assume inconsistent positions and is based on the principle of election and ratification, . . ." 73 S.D. at 586, 46 N.W.2d at 914.

In *Henrich v. Newell*, 59 S.D. 372, 240 N.W. 327, the court held that the principles of equity and fair dealing would estop heirs who had received benefits of a postmortem family agreement from later challenging the validity of the agreement, citing the following language from *Dobbs v. Elevator Co.*, 25 S.D. 177, 182, 126 N.W. 250, 252:

> "It seems to be generally held that, where one having the right to accept or reject the transaction takes and retains the benefits thereunder, he becomes bound by the transaction and cannot avoid its obligation or effect by taking a position inconsistent therewith. Thus, it has been repeatedly held that a person by the acceptance of benefits may be estopped from questioning the existence or validity of a contract."

> "Appellant's conduct in accepting the benefits of the . . . agreement . . . she having knowledge of the facts . . . brings her squarely within this rule." 260 N.W.2d 350.

After deliberating for some two hours and five minutes the jury requested the court to: "Define fiduciary duty" (Tr. 834). The court, without giving any other instructions, again instructed the jury that a fiduciary relationship existed between the defendant and the plaintiff as a matter of law (Tr. 835), and stated in regards to defendant's objection (Tr. 834) as follows:

> The Court: The objection is overruled. I might also add for the record that the instruction is taken from the case of *Mobil Oil Corporation v. Rubenfeld*,

339 N.Y.S.2d 623, a 1972 New York State Court Appellate case (Tr. 837).

As Judge Bright stated:

> "This error was not made harmless by the context in which it occurred, as the majority suggests. *Ante*, slip op. at 19. The disputed instruction was repeated by the court without benefit of context when, after two hours of deliberations, the jury returned with the question, 'Define fiduciary duty.' (App. 31a, note 4).

The opinion cited by the district court as authority for such instruction was reversed on appeal, *Mobil Oil Corp. v. Rubenfeld*, 72 Misc.2d 392, 339 N.Y.S.2d 623, *rev.* 370 N.Y.S.2d 943 (1975). The court in *Rubenfeld* held that a fiduciary relationship did not exist between Mobil Oil Co., lessor of a gasoline service station and the lessee thereof—Rubenfeld.

The reasoning of the court in *Rubenfeld*, 370 N.Y.S.2d 943, is equally applicable to the case at bar, the court stating therein as follows at page 945:

> "The question before us is whether a tenant under a lease of commercial property—a gasoline service station—may defeat the landlord seeking possession of the premises at the end of the term, by asserting a retaliatory defense that the landlord failed to renew the lease because the tenant resisted the landlord's actions in enforcing tie-in and price fixing agreements in violation of the antitrust laws. The civil court held that the retaliatory defense was valid and dismissed [Mobil's] petition (72 Misc.2d 962, 339 N.Y.S.2d 623); that judgment was affirmed by the Appellate term by a divided court (77 Misc. 2d 962, 357 N.Y.S.2d 589). We reverse and grant judgment in favor of the petitioner [Mobil]. A retaliatory defense based upon such circumstances does not result in a continuing obligation on the

> landlord to remain in a contractual relationship with the tenant."

The court further stated on pages 946-947 that:

> "The rights arising out of real property law have ancient bases; any change in these rights is customarily achieved by legislative or constitutional enactment. Under ordinary circumstances, a landlord is not obligated to renew a lease [citations omitted] even though the tenant may have invested capital and energy in the expectation of renewal. Nor in the absence of statute may one contracting party be compelled to deal with the other beyond the contract term. [citations omitted] . . . Hence, it must be concluded that the termination of leases and franchises, . . . is to be judged in the light of the traditional principles of real property and contract law.
>
> . . . though the law sometimes extracts relationships not intended by the parties [cite omitted] and though, as Judge Kassoff pointed out in his opinion, a commentator argues that a fiduciary relationship should exist in franchising agreements (*Mobil Oil Corp. v. Rubenfeld*, 72 Misc. 2d 392, 400, 339 N.Y.S.2d 623, 632). New York has not adopted that concept."

Contrary to the majority of the panel, *Shell Oil Co. v. Marinello*, 120 N. J. Super. 357, 294 A.2d 253 (1972) 307 A.2d 598 (1973), does not support Arnott's claim that a fiduciary relationship existed under South Dakota law. In any event New Jersey law does not control the law to be applied in the case at bar, that of South Dakota. The facts in *Shell v. Marinello*, were completely different from those in the instant case. In *Marinello*, there were two (2) agreements, a Lease and a separate Dealer Agreement. The separate Dealer Agreement provided that the dealer would purchase gasoline solely from Shell and granted a license to use its trademarks in the

operation of the dealership. In the case at bar there was no dealer agreement; there was only the lease of real property.

Marinello further sued for reformation and made no claim that a fiduciary relationship existed and the court made no reference to such. *Nowhere in the court's opinion (trial or supreme) does the word fiduciary even appear.* The *Marinello* court merely held that Shell could not terminate a lifetime lease and a separate dealer agreement without cause. As the *Marinello* trial court stated:

> "The question here is whether or not . . . Shell can, without cause or justification, terminate the relationship and evict defendant from this station." 294 A.2d 261.

Courts of other states that have considered the rationale of *Marinello* have unanimously rejected it. See *Texaco Inc. v. A. A. Gold, Inc., et al.*, 357 N.Y.S.2d 951 (1974) *aff'd* 358 N.Y.S.2d 973 (1974) where the court held that a separate dealer agreement and a lease of a service station did not establish a franchise relationship or the rights and obligations of a franchisor and franchisee attendant thereto. The court held the lease was cancellable pursuant to its terms.

In *Goldinger v. Boron Oil Co.*, 375 F. Supp. 400, 410 (W.D.Pa. 1974) *aff'd* 511 F.2d 1393 (3rd Cir. 1975), the court stated at page 410:

> "The plaintiff has cited one case from New Jersey involving an independent gasoline dealer operating under a franchise agreement with a separate written agreement for the lease of the station premises. *A termination of the franchise agreement and a cancellation of the lease* was resisted by the operator on the grounds that the reasons given by the oil company did not constitute good cause in

> that the grounds given did not demonstrate the failure of the dealer to substantially comply with his obligation under the lease and dealer agreement. Involved in *Shell Oil Co. v. Marinello* . . . was the statutory policy of the state of New Jersey expressed in its Franchise Practices Act. Under that statute good cause was a requirement for any cancellation of a franchise. *The existence of a lease coterminous with the franchise* was an added element in that case. There is no similar provision in Pennsylvania whose law controls the interpretation of the present contract and under the Pennsylvania Uniform Commercial Code, Sec. 2-309(2), in the absence of any controlling contractual provision, agreements calling for successive performance may be terminated by either party without cause." (Emphasis added).

As the court stated in *Whims Applicance Service v. General Motors Corp.*, 1978-1 Trade Cases ¶ 62093 (N.D. Ohio 1978) at pages 74790, 74791:

> "Plaintiff argues . . . upon the authority of *Shell Oil Co. v. Marinello* . . . this argument must be considered under the law of Ohio.
>
> * * *
>
> The plaintiff has cited neither cases decided under Ohio law nor enactments of the Ohio Legislature that indicate any Ohio common law requirement that a good-cause-for-termination provision be appended to a dealer agreement which has expired through the elapse of the contract period. The courts of other states that have considered the rationale of *Marinello* have unanimously rejected it. This court holds that the courts of the state of Ohio would also reject the reasoning of *Marinello.* Accordingly the plaintiffs fail to state a cause of action under the common law of Ohio."

Failure to maintain a 24-hour operation even under the *Marinello* court would constitute good cause to ter-

minate Arnott's lease. The *Marinello* court stating in that regard that:

> "As to hours of operation, Shell should have the right to direct a change in hours in any lease renewal, including a demand for 24-hour operation of the station . . . 294 A.2d 264.

The *Marinello* court further went on to state that Shell had waived the 24-hour requirement:

> "At the end of January and twice in March 1970 Shell did send letters to Marinello informing him that he was in violation of this provision of the lease. Shell acknowledges that after these letters were sent, the Newark district office received complaints from borough officials, as well as at least one neighbor, about a 24-hour operation at this location, and that Shell no longer insisted upon adherence to this provision of the lease, but permitted Marinello to revert to the hours that he had maintained under the prior lease." 294 A.2d 265

In a footnote, the *Marinello* court stated:

> . . . Shell had never complained that it [failure to operate 24 hours] was a violation. . . . in any event Shell never gave Marinello written notice of a default under the lease by reason thereof. Shell terminated the lease by giving written notice of nonrenewal upon its anniversary date, the lease providing for automatic annual renewal unless written notice to the contrary. 294 A.2d 265 (fn)

There is no question that failure to maintain 24-hour operation constituted good cause to terminate the lease. See *Gordon v. Crown Central Petroleum Corp.*, 423 F. Supp. 58 (D.C. Ga. 1976), *aff'd* 564 F.2d 413 (5th Cir. 1977), where the court stated at pages 61, 62:

> The Court is unable to agree that the 24-hour requirement constitutes an anti-competitive practice. . . . The regulation in question serves the public convenience and provides a competitive stimulus; it is not illegal under the antitrust laws.
>
> * * *
>
> Further, the 24-hour requirement does not violate the rule of reason;
>
> * * *
>
> The plaintiff's final argument is that the dealer agreement in question is unconscionable . . . .
>
> The Court cannot find that the contract in the case *sub judice* was an unconscionable contract or a contract of adhesion.
>
> Accordingly, the Court finds for the defendant on all issues. Termination of the plaintiff's Agreement does not violate the Georgia Gasoline Marketing Practices Act, the 24-hour clause does not violate the Sherman Act, and the Agreement in question is not an unconscionable contract.

A. It Was Error For The District Court And For The Panel Not To Apply The Law Of The State Of South Dakota. The South Dakota Franchise Act Excluded Service Stations From Its Provisions.

In its effort to support the trial court's erroneous position that as a matter of law a fiduciary relationship existed between Amoco and Arnott, the panel majority in contravention of the Erie Doctrine and the Rules of Decision Act, relies upon cases from the states of New Jersey, Pennsylvania, Utah, and West Virginia. An examination of those cases reveals that in no way do they support the panel majority's position: (1) *Shell Oil Co. v. Marinello*, 294 A.2d 253 (N.J. Super. 1972), *aff'd* 307 A.2d 598 (N.J. 1973) (where is provision for automatic renewal unless notify in writing of nonrenewal—court held cannot cancel except for good cause); (2) *Amerada Hess Corp. v. Quinn*, 362 A.2d 1258 (N.J. Super. 1976) relationship can be terminated for good cause the court stating at page 1258:

"to deny Hess the right to terminate here would . . . pervert the spirit of the "good cause" requirement and allow defendant to flagrantly flaunt his disregard for the law, his private contracts, and the public interest. Such an absurd result cannot be deemed to have been contemplated or intended by the legislature."

(3) *Atlantic Richfield Co. v. Razumic*, 390 A.2d 736 (Pa. 1976) (franchise relationship not terminable upon expiration of term, but for good cause only failure to keep station clean constituted good cause); (4) *Seegmiller v. Western Men Inc.*, 437 P.2d 892 (Utah 1968) (plaintiff's failure to discharge his duties as required by contract justified cancellation); (5) *Ashland Oil Inc. v. Donahue*, 223 S.E.2d 433 (W. Va. 1976) neither word *"franchise"* nor *"fiduciary"* is mentioned, court held transaction governed by the West Virginia Uniform Commercial Code and stated as follows at page 440:

"Having determined in this case that the lease agreement and the dealer contract should be construed together and considered to be one transaction, it is clear that what is involved is a transaction in goods (petroleum products) which is governed by the Uniform Commercial Code-Sales. See W. Va. Code 46-2-102 and 46-2-105. In cases such as this, the rules by which transactions should be governed are generally stated in the Uniform Commercial Code-Sales, and within that framework, we believe that defenses may be made and proof may be offered in a manner sufficient to protect the commercial rights of all parties whether they be economically strong or weak."

The other cases cited by the panel majority from the states of Michigan and Louisiana, *Saad v. Shell Oil Co.*, 460 F. Supp. 114 (E.D. Mich. 1978) and *Frisard v. Texaco, Inc.*, 460 F. Supp. 1094 (E.D. La. 1978) are inapposite in that they dealt with the application of the

Federal Petroleum Marketing Practices Act, 15 U.S.C. § 2801, *et seq.*, which was enacted on June 19, 1978. That act was not in effect during the period at issue in the case at bar.

None of the cases cited by the panel majority held that as a matter of law, a fiduciary relationship exists between a lessor and a lessee or between a franchisor and a franchisee. None of the cases cited by the panel majority even mention or refer to the word *"fiduciary."*

However, there was not even a franchisor-franchisee relationship in the case at bar. In an attempt to establish such a relationship the panel majority refers to the South Dakota Franchise Act, S.D. Compiled Laws, ch. 37-5A enacted in 1974, after the issues in this case had arisen. The panel majority's statement (App. 16a) that:

"South Dakota law therefore indicates that the franchisor and franchisee of a service station operation are involved in a fiduciary relationship . . ."

is a complete misstatement of the law of South Dakota.* Service station operations were purposely excluded from the application of the South Dakota Franchise Act. The legislature of the State of South Dakota in considering

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* As Judge Bright stated in his dissent (App. 30a):

The South Dakota franchise law contains detailed registration and public disclosure provisions akin to those found in the Securities Act of 1933, . . . This scheme of franchise regulation doubtless represents a substantial departure from the common law of South Dakota. But even if the franchise statute reflected existing common law standards applicable to the lease challenged here, the district court's instructions would remain unjustified. The statute merely enjoins unfair or inequitable practices. S.D. Compiled Laws Ann. §§ 37-5A-51 and 37-5A-66(7). It does not establish a fiduciary relationship between franchisor and franchisee or impose a standard of utmost good faith.

the proposed South Dakota Franchise Act designated as Senate Bill No. 210, amended such bill to delete therefrom service stations, i.e., the marketing of motor vehicle fuel.

When the proposed South Dakota Franchise Act was introduced Senate Bill No. 210 in 1974 in the Forty-Ninth Session, of the South Dakota Legislative Assembly* it contained the following paragraph consisting of lines numbered 13-20 which specifically included station operations:

> ** [13]"Franchise does not include any business which is operated under [14] a lease on the premises of the lessor as long as such business [15] is incidental to the business conducted by the lessor on such [16] premises, including, without limitation, leased departments [17] and concession. *Notwithstanding anything in this Act to*[18] *the contrary, franchise shall include a contract, lease or* [19] *other agreement whereby the franchisee is granted the right* [20] *to market motor vehicles or motor vehicle fuel.*" (emphasis added) (App. 46a)

This provision applying to the marketing of motor vehicles and motor vehicle fuel lines 18, 19 and 20 was deleted from the Act as follows:

> Mr. President: The Committee on Commerce respectfully report that they have had under consideration Senate Bill No. 210
>
> And return the same with the recommendation that said bill be amended as follows:
>
> On page 2, line 17 of the printed bill strike everything after the period, and strike all of lines 18, 19 and 20.

* See original Sen. Bill 210, 1974, 49th Sess. on file in S.D. Legislature.

** Lines as numbered in original bill.

> On page 8 of the printed bill between lines 13 and 14 insert the following: "(5) All franchisors who have a net worth of $10,000,000.00 or more and have had at least twenty-five franchises in operation in the United States for the last twenty-five years."
>
> And that as so amended said bill do pass.
>
> 1974 South Dakota Senate Journal at 544, App. 50a.

Senate Bill No. 210 was subsequently enacted into law as SDCL 37-5A as follows:

> "Franchise does not include any business which is operated under a lease on the premises of the lessor as long as such business is incidental to the business conducted by the lessor on such premises, including, without limitation, leased departments and concessions." (App. 56a)

The district court herein did not rely upon the South Dakota Franchise Act, Judge Nichol relied solely upon *Mobil Oil Corporation v. Rubenfeld, supra,* a 1972 New York State Court Appellate case which had been reversed in 1975.

> The Court: The objection is overruled. I might also add for the record that the instruction is taken from the case of *Mobil Oil Corporation v. Rubenfeld,* 339 N.Y.S.2d 623, a 1972 New York State Court Appellate case (Tr. 837).

The panel majority's statement that the South Dakota Franchise Act applies to the marketing of motor fuel and was a codification of the common law is clearly erroneous.*

* As Judge Bright stated in his dissent (App. 30a):

> "In the passage relied on by the majority, plaintiff's counsel was attempting to explain the New Jersey Superior Court's interpretation of that state's franchise

(Footnote continued on following page)

No court has ever held that the existence of a franchise relationship places the franchisor in the position of a fiduciary. In *Eaton, Yale & Towne, Inc. v. Sherman Industrial Equip. Co.*, 316 F. Supp. 435 (D.C. Mo. 1970), Judge Meridith in disposing of a similar claim that the termination of a distributor breached a fiduciary relationship stated as follows at page 445:

> ". . . defendant, Sherman Industrial alleges that the plaintiff breached its fiduciary duty toward that defendant. The Court has been cited no authority that indicates the existence of a franchisor-franchisee relationship places the franchisor in the position of a fiduciary. The record shows no special circumstances that would require this Court to impose a fiduciary relationship where it does not normally exist. It is the opinion of the Court that the defendant has not proven the existence of a fiduciary relationship . . ."

In any event, federal courts, when faced with a non-federal question, are required by the Erie Doctrine (*Erie Railroad v. Tompkins*, 304 U.S. 64 (1938)) to apply the substantive law of the state in which they sit, regardless of whether they approve or disapprove of the rules established thereby. The Rules of Decision Act (28 U.S.C. 1652) is explicit on that point and provides as follows:

> "The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States in cases where they apply." 28 U.S.C. 1652

footnote continued

statute in *Shell Oil Co. v. Marinello*, . . . Judge Nichol interrupted to observe, "In other words, they were codifying the common law." Plaintiff's counsel replied, "That's exactly right." Judge Nichol then said, "Just as *maybe* South Dakota did when it adopted the Franchise Act, was codifying what was really the law in South Dakota anyway." (Emphasis added.) Plaintiff's counsel responded, "That's exactly what the New Jersey Court said." (App. 30a, fn.2)

It is not the province of a federal court—district or appellate—to look beyond the designated state, here the State of South Dakota, in an attempt to find an excuse for not applying the substantive law of South Dakota.

The majority's statement (App. 17a) that:

> "In any event, when the instructions on breach of fiduciary duty are considered as a whole, error, if any was harmless. See note 7 *supra*."

is based upon the following instruction set forth in note 7 given over Amoco's objection, that misstated the law of South Dakota where, as here, there is a valid written agreement between the parties:

> You are instructed that under the laws of the State of South Dakota that the terms of the contract may be implied if manifested by the conduct of the parties. Therefore, if you should find that under all the facts and circumstances presented, that the defendant's conduct implied that it would supply plaintiff with sufficient quantities of gasoline and other petroleum products to enable the plaintiff to maintain a 24-hour operation, then you may also find that the defendant's failure to fulfill the implied condition would excuse the plaintiff's failure to maintain a 24-hour operation of the station. (App. 11a).

The Supreme Court of South Dakota has specifically stated that that is not the law. In *Thurston v. Cedric Sanders Co.*, 80 S.D. 426, 428, 125 N.W.2d 496, 498 (1963), an action brought by the plaintiff to recover from the defendant upon an implied contract, the Supreme Court of South Dakota in dismissing such action stated:

> "There is no question but what, where there is a valid express contract existing between parties in relation to a transaction, fully fixing the rights of each, there is no room for an implied promise or suit or quantum meruit. [cite omitted] The rights of the parties are controlled by the contract, ...

Amoco requested the court to instruct the jury regarding the legal requirement that Amoco allocate its supply of gasoline and Arnott's acceptance of such allocated amount since he had made no objection thereto within the prescribed thirty (30) day period. As a matter of South Dakota law SDCL 57-7-37 to 42 Arnott was estopped from claiming excuse or inadequate supply (Tr. 828). The refusal of the court to give Amoco's Instruction No. 8, was extremely prejudicial and deprived Amoco of a substantial defense. Amoco was not "merely repeating the argument that the evidence offered did not create a submissible case" as the majority states (App. 25a). The applicability of these sections of the South Dakota law, which are §§ 2.615 and 616 of the Uniform Commercial Code, to the case at bar is best illustrated by the Washington Court of Appeals decision in *American Oil Co. v. Columbia Oil Co.*, 567 P.2d 637 (1977) wherein the court at page 639 stated as follows:

> This section of the statute does not apply to the termination of a contract by either the buyer or seller; rather, it applies to a situation where it becomes impossible or impracticable for a seller to perform during the existence of a contract. RCW 62A2-615 is meant to be asserted as a defense by a seller who is unable to deliver due to unforeseen circumstances and as a consequence has been sued by the buyer for breach of contract. In fact, the statute is located in the Breach, Repudiation, and Excuse section of the UCC and creates a defense rather than a substantive right. Uniform Commercial Code, *supra* at 335 . . .

> If Columbia was dissatisfied with American's allocation prior to American's termination of the contract, it failed to give timely notice of that fact as required by RCW 62A.2-616.

III.

THE MAJORITY'S DECISION ESTABLISHES AN ERRONEOUS STANDARD OF PROOF UNDER SECTION 1 OF THE SHERMAN ACT AND ELIMINATES THE COMBINATION AND CONSPIRACY REQUIREMENT THEREFROM.

The record evidence in this case reflects that Amoco had some ninety (90) stations in the Sioux Falls marketing area (Tr. 532) and that such dealers were free to post any price they so desired. Furthermore, when dealers posted the suggested price they did so because of their own individual decisions and in light of local competitive conditions. This fact alone establishes that dealers have retained their pricing discretion. There was no evidence that Amoco had threatened to terminate any leases if the lessees did not follow a set pricing policy, and there was no evidence that such had ever been done. There is no evidence of any coercion of Amoco dealers throughout the relevant market.

As stated by Judge Bright (App. 33a):

> "First, the evidence provides no support for the notion that Arnott unwillingly complied with Amoco's 'price directives.' 'Directives' cannot mean merely Amoco's suggested price: such suggestions, standing alone, were clearly permissible. *Susser v. Carvel Corporation*, 332 F.2d 505, 510 (2d Cir.), *cert. granted*, 379 U.S. 885 (1964), *cert. dismissed as improvidently granted*, 381 U.S. 125 (1965). The majority must be referring more particularly to the conversations over coffee that Arnott had with Amoco representatives when he deviated from the suggested prices. But there is no evidence that Ar-

nott changed his prices as a result of these conversations, or that he thereafter hewed more closely to Amoco's suggested prices. The cited incident with Dick Lucas likewise resulted in no change; Arnott continued to price independently (*i.e.*, generally higher than Amoco's suggested prices) throughout the period of his lease. Hence, in this case no combination existed and no actual fixing of prices occurred. *Cf. Quinn v. Mobil Oil Company*, 375 F.2d 273 (1st Cir.), *cert. dismissed*, 389 U.S. 801 (1967) (affirming dismissal of an antitrust complaint on similar facts).

"The panel's second theory is also inapplicable to the facts of this case. Having reviewed the record, I find no substantial evidence of a combination between Amoco and its other dealers. The record simply does not support the majority's characterization of the dealer's behavior as 'acquies[cence] in [an] enforced pricing policy.' *Ante*, slip op. at 22. In contrast to the fragments of Mrs. Pascoe's testimony quoted by the majority, *ante* slip op. at 20, nine witnesses who were past or present Amoco lessees (including Greg White) testified that retail gas prices were only suggested by Amoco, that the dealers possessed final authority to set prices, and that this authority was frequently exercised independently. Moreover, not one testified that his lease had been threatened or terminated in retaliation for independence in pricing. *Cf. Umphres v. Shell Oil Company*, 512 F.2d 420, 422 (5th Cir.), *cert. denied*, 423 U.S. 929 (1975) (holding comparable evidence of vertical price fixing to be clearly insubstantial)."

The record evidence disproving the claim of retail price fixing is overwhelming. Arnott testified that he did not follow the suggested retail price; that he kept his price generally higher (Tr. 47); and that on only one (1) occasion, did he have any pricing problem, i.e., when Dick Lucas drove up to buy gas, said the price was too high and drove off, but he, Arnott, did not change the price (Tr. 47, 144).

Jim Breen, Assistant Manager of Plaintiff's station, called by the Plaintiff, testified that Amoco only suggested the price (Tr. 336); that he knew of no problems with Amoco about pricing (Tr. 335); that Dick Lucas was one of their best gas customers (Tr. 335); that there was only one problem, Dick Lucas not buying gas one afternoon, saying the price was too high and driving off and that the price was not changed at that time (Tr. 335-35); and that Arnott was free to price higher anytime he wanted to (Tr. 337).

Donald Christensen, Manager of Plaintiff's station, called by the Plaintiff testified that Arnott did not follow the suggested price but deviated from it (Tr. 345, 351); that Arnott was free to set his own prices and he did (Tr. 351-352).

Greg White, a former Amoco lessee who voluntarily cancelled his lease, was called by Plaintiff and stated the only time he was threatened with cancellation was over a car wash (Tr. 387) not over pricing; that he priced independently and he would watch his traffic and volume as his price depended on the market around him and the first customer that said gas was cheaper down the street he'd lower his prices (Tr. 386).

Mrs. Pasco, widow of an Ex-Amoco lessee, called by Plaintiff testified that his lease was renewed (Tr. 362-3); he was not threatened with cancellation (Tr. 376); he would deviate from the suggested retail price (Tr. 367); and that she sold the station because of her husband's heart attack and health (Tr. 371, 379).

The Amoco dealers who testified, uniformly agreed that they were free at all times to determine their own

retail prices. Gary Gould, an Amoco dealer for five years, testified that he was never threatened with loss of his lease (Tr. 547); that there has never been any attempt to regulate the price of the gasoline he sold other than Government controls (Tr. 550); and that if he violated his lease, he would assume he would be cancelled (Tr. 551). Charles Klusak, an Amoco dealer for 31 years, testified that he did not follow the suggested retail price (Tr. 556); and that he carried and displayed competitive TBA (Tr. 557). Wilbur Meelberg testified that he was never coerced and that he was never threatened with termination of his lease (Tr. 562-3). Bob Wrage testified that he went along with some of the programs (Tr. 566); that there never was any threats or coercion used to make him go along with such programs (Tr. 566); and that he was free to set his own prices (Tr. 566). Gary Parks testified that he was never threatened with termination of his lease (Tr. 573); that there never was any attempt on behalf of Standard Oil to fix his prices (Tr. 573). Lance Carson testified that his lease was never threatened (Tr. 580); that he carried and displayed non-Standard products and no one ever complained about that to him (Tr. 580); and that no attempts had been made by Amoco to set his prices (Tr. 581).

Lloyd Carson testified as follows:

> Q. Was there ever any attempt by Standard Oil to regulate the price of your gas?
> A. Not on the retail side of it, no. They'd take and tell me the price I pay for my gasoline—
> Q. Certainly, we realize that. Did they tell you what to charge?
> A. —what I had to pay for the price of gasoline?
> Q. But they would not tell you what to charge?
> A. What I had to sell for, no. (Tr. 595.)
> Q. Were you free to set your own retail price?
> A. Yes, sir. (Tr. 599.)

Donna Carson testified that there were no threats, no coercion (Tr. 587-8); and that there were no attempts by Standard Oil to set their prices (Tr. 581). George Little testified that he was free to set the price of his gasoline as he saw fit (Tr. 603). He stated:

> Q. Has that ever caused any problems with the Standard Oil people?
> A. No.
> Q. Did Standard Oil ever dictate the price of gasoline to the consumer, to the motoring public, to you?
> A. Not to my knowledge.
> Q. Were you free to set the price as you saw fit?
> A. Yes, sir. (Tr. 603.)*

A. The Denial Of Amoco's Instructions That (1) A Corporation Could Not Conspire With Its Officers, Employees, Or Agents And That (2) It Was Lawful And Not Coercion For Amoco's Salesman To Engage In Exposition, Argument, And Persuasion Resulted In A Misstatement Of The Law To Amoco's Prejudice.

To constitute a violation of Section 1 of the Sherman Act, there must be a contract, combination, or conspiracy. As stated by the Seventh Circuit in sustaining a directed verdict for the defendant in *Gordon v. Illinois Bell Telephone Company*, 330 F.2d 103 at 107 (7th Cir. 1964):

> "Moreover, there is nothing in the record to support a conclusion that defendants' acts were pursuant to any agreement, combination, or conspiracy

* Amoco Lessees also testified uniformly that they were free at all times to purchase, sell, and to openly display any and all competitive brands of motor oil and TBA (tires, batteries, and accessories) and were free to accept or reject any promotional programs (Gould, Tr. 546-48; Klusak, Tr. 555, 557-58; Meelberg, Tr. 561-62; Wrage, Tr. 566-67; Parks, Tr. 572-76; Lance Carson, Tr. 579-81; D. Carson, Tr. 587-89; Lloyd Carson, Tr. 593-95; Little, Tr. 601-03).

> between any of the defendants and any third party not employed by the telephone company. It is undisputed that the individual defendants acted only on behalf of the company, the corporate defendant, and not on their own behalf. Thus, there was no proof of the 'combination' or 'conspiracy' element required under Section 1 of the Sherman Act. *Nelson Radio & Supply Co., Inc. v. Motorola, Inc.*, (5th Cir., 200 F.2d 911). (Emphasis added.)

The combination, contract, or conspiracy in question must be between the defendant and some other independent entity. As a matter of law, a corporation cannot "agree" with its officers, its employees, its agents, or its unincorporated divisions. *Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd.*, 416 F.2d 71 (9th Cir.), *cert. denied*, 396 U.S. 1062 (1969).

Amoco requested the court to instruct the jury that the defendant corporation could not conspire with its officers, employees, agents, or with its unincorporated divisions. The court, however, refused to so instruct the jury to Amoco's prejudice, depriving it of a substantial defense. In refusing defendant's request for such instruction the court stated: ". . . *while I think the word conspiracy was mentioned in the pleading, there was no evidence whatever on conspiracy and that is the reason why I have not given it* (Tr. 826). (Emphasis added.)

In *Quinn v. Mobil Oil Company*, 375 F.2d 273 (1st Cir. 1967), *cert. denied*, 389 U.S. 801 (1967), the Court of Appeals affirmed the trial court's dismissal of plaintiff's complaint and stated that a unilateral attempt by the defendant to coerce plaintiff into making a price-fixing agreement was not actionable:

> "The allegation that defendant pressured plaintiff to reduce his retail price at best amounts to a unilateral attempt to coerce plaintiff into making such

> an agreement. Therefore, the immediate question is whether this is actionable under Section 1 of the Sherman Act. I think not. If Congress intended to make attempts actionable under this section undoubtedly it would have done so expressly as it did in the very next section of the Act (15 U.S.C. § 2) dealing with monopolies. It certainly is not within our province to read into this section interstitially a proscription which Congress clearly did not intend." (375 F.2d at 275.)

The denial of Amoco's instruction that it was lawful and not coercion for Amoco's salesman to engage in exposition, argument, and persuasion resulted in a misstatement of the law to Amoco's prejudice. The Supreme Court has upheld the legality of a supplier's efforts to persuade and urge his customer to take a particular action and has distinguished this conduct from coercing his customers. *Ford Motor Co. v. U.S.*, 335 U.S. 303, 318 (1948). In defining the line between exposition, persuasion, and argument, all of which are legal and coercion which may be illegal, the Supreme Court specifically approved the following formulation:

> "In exposition, one may expound the merits of that which he has to sell. He may explain its nature, and by his exposition make a clear picture of what he has.
>
> "By persuasion, he may endeavor to persuade the person to whom he is talking to accept that which he has to offer.
>
> "There is little difference, little advancement in future progress to argument. Persuasion means something softer than argument, perhaps, but one may argue with another the respective merits of his product and other products being offered to the person to whom he makes his offer. All of these are proper.

"He may not go beyond that, and use something that is within his power as a club to coerce the person to accept that which he has to offer." *Ford Motor Co. v. U.S.*, 335 U.S. 303, 318.

Gray v. Shell Oil Co., 469 F.2d 742 (9th Cir. 1972), makes it clear that a supplier may suggest retail prices to its dealers and use "persuasion" to get them to adopt the suggested prices. No violation is made out unless plaintiff can show that the supplier's conduct rose to the level of coercion sufficient to deprive the dealers of their free choice. Plaintiff Arnott made no such showing. Upon the same facts as exist in the case at bar, the Ninth Circuit in *Hanson v. Shell*, 541 F.2d 1352 (1976), affirmed the district court's grant of a directed verdict for defendant Shell.

Thus, it was legal for Amoco to suggest a resale price of gasoline to dealers. Similarly, it was lawful for Amoco's sales personnel to expound the advantages of purchasing TBA from Amoco and to attempt to persuade dealers that Amoco's sales programs were beneficial to the dealer. Amoco requested the court to instruct the jury herein to that effect, i.e., that exposition, persuasion, and argument were legal. The court, however, refused to so instruct the jury to Amoco's prejudice (Tr. 831).

B. The Lease Was Terminated For Legitimate Business Reasons.

There was no causal relationship between the alleged price-fixing activities and termination of the lease. Arnott was granted thirty days to cure his breach of the lease and to begin operating 24 hours a day. The notice provided *inter alia*, as follows:

"You have been violating the conditions of said paragraph 2 in that you have substantially curtailed your hours of operation. Paragraph 9(a) of the lease gives our Company the right to cancel . . . . You may, therefore, consider this letter written notice of our intent to cancel your lease effective September 5, 1973, unless the default above-stated is completed remedied and we are notified thereof prior to said date or in lieu thereof, you have made satisfactory arrangements with Mr. Clint Bucklin." (Tr. 163-4).

Instead of curing such default, lessee by his attorney made the following counteroffer:*

"Please be advised that Mr. Arnott is ready, willing, and able to perform all lease arrangements, including 24-hour operation, upon the assurance of the American Oil Company that it will supply him with all the gasoline and other petroleum products that he can sell." (Tr. 466-7.)

Arnott further waived the thirty (30) day period, i.e., to September 5, he was granted to correct the default, and vacated the station on August 6, 1973.

In contrast to the majority's statement (App. 21a), the jury could *not* "infer that Arnott's failure to follow Amoco's pricing directives was the proximate cause of the termination of his lease" in that at the time of such termination, *all prices, retail and wholesale, were frozen and had been frozen by the U.S. Government since June 13, 1973 and could not be moved up or down.* It is

* This was a specious offer, Arnott knew Amoco was under the U.S. Government's Allocation Program. (Tr. 87-8.) As Dick Lucas testified:

Q. Were you able to comply with that request?
A. We were not.
Q. Why?
A. We were under a voluntary allocation program as requested by the U.S. Government. (Tr. 492.)

undisputed that the United States Government in May 1973 instituted a plan to allocate gasoline and other petroleum products. It is further undisputed that the United States Government froze the prices of all petroleum products, including that of gasoline on June 13, 1973, and that such price freeze of gasoline was in existence at the time Arnott's lease was cancelled (Tr. 791).

Giving Arnott notice of termination on August 6, 1973, for failure to operate 24 hours coupled with a grant of 30 days to cure such breach, cannot by any stretch of the imagination constitute termination for failure to fix prices at a time when all prices were frozen and had been frozen for months, i.e., since June 13, and by law prices could not be moved up or down.

IV.

IT WAS IMPROPER FOR THE PANEL TO FIND THAT AMOCO MISREPRESENTED THE TERM OF THE LEASE WHEN THAT WAS NOT AN ISSUE PRESENTED TO OR CONSIDERED BY THE TRIAL COURT.

The only "misrepresentations" that were at issue before the trial court, were the alleged misrepresentations concerning: (1) Defendant's promotions; (2) Promotional merchandise; (3) Equipment; (4) Products; and (5) Profitability of the installation of a car wash.

The "misrepresentations" at issue were set forth by the Plaintiff Arnott in his Amended Complaint § VIII as follows:

> "That during the time period of the aforementioned dealer lease agreement, the defendant, through its agents and employees, made knowingly false, deceitful and fraudulent misrepresentations to the Plaintiff concerning [1] Defendant's promotions, [2] promotional merchandise, [3] equipment, [4] products and [5] the profitability of the installation of a car wash. That Plaintiff justifiably relied upon said misrepresentations and false statements and thereby incurred unnecessary expenses and sustained lost profits."

The jury was instructed by the court as to Arnott's claim of misrepresentation as follows:

> "Under Count I of his Complaint, the plaintiff brings suit against the defendant for actual and punitive damages on account of certain representations made by agents and employees of the defendant to the plaintiff which the plaintiff claims were false and fraudulent. The representations were both oral statements made by agents and employees of the defendant and written statements contained in the defendant's Statement of Policy [Exhibit 1]. The representations relate to the service station leased by the defendant to the plaintiff and to the operation of that service station." (Tr. 772-3)

> "The plaintiff claims that defendant represented that . . . [1] plaintiff would be an independent businessman . . . [2] no company representative would bring any pressure to bear on the plaintiff if he chose to handle competitive brands of motor oils . . . [3] with respect to tires, batteries, and accessories, that plaintiff would have complete freedom to buy these products from whomever and in whatever quantities he chose . . . [4] the plaintiff would have the absolute right to set his own resale prices on gasoline and all Standard Oil products . . . [5] the plaintiff would not be pressured into participating in advertising, sales promotions or merchandising programs . . . [and] that defendant misrepresented [6] the benefits to be received by the plaintiff for the installation of a car wash." (Tr. 773-4)

> "You are instructed that a claimed representation to constitute a cause of action for fraud and deceit

must be of a material fact, that it must be false and must have been known by the party making the same to be false at the time it was made and must have been made with the intent to deceive and the person to whom it was made must have acted in reliance thereon and been thereby induced to change his position to his pecuniary damage."

"In this case, if you find from the evidence that the defendant's agent or agents represented that Standard Oil would follow the policies of the company as outlined in Exhibit 1, AMOCO's policy statement, and the lease, that such representations were false and known by the defendant's agent or agents to be false, or in reckless disregard of the truth, and that they were made with an intention to deceive the plaintiff, and if you further find that the plaintiff believed such representations and that he relied thereon, then your verdict should be for the plaintiff for such reasonable damages as he has sustained by reason of such claimed fraudulent representations." (Tr. 781-2)

The issue of misrepresentation of the term of the lease was improperly considered by the Appellate Court. There was no claim made by Arnott in his Complaint, Amended Complaint or during trial that Amoco misrepresented the term of the lease. It is axiomatic that issues, neither pleaded nor presented to the trial court, cannot be raised for the first time on appeal. The reason the panel allowed misrepresentation of the lease term to be raised for the first time on appeal was simply because there was no evidence submitted of any damages regarding fraud on the issues presented to the jury—the only evidence of damages being loss of future profits.

As stated by the United States Supreme Court in *Singleton v. Wulff*, 428 U.S. 106, 120 (1976); in reversing the decision of the Eighth Circuit, 508 F.2d 1211 (8th Cir. 1975):

"It is the general rule, of course, that a federal appellate court does not consider an issue not passed upon below. In *Hormel v. Helvering*, 312 U.S. 552, 556 (1941), the Court explained that this is 'essential in order that parties may have the opportunity to offer all the evidence they believe relevant to the issues . . . [and] in order that litigants may not be surprised on appeal by final decision there of issues upon which they have had no opportunity to introduce evidence.' We have no idea what evidence, if any, petitioner would, or could offer in defense . . ., but this is only because petitioner has had no opportunity to proffer such evidence. Moreover, even assuming that there is no such evidence, petitioner should have the opportunity to present whatever legal arguments he may have in defense . . . ." 428 U.S. 120

Arnott specifically testified that the automatic renewal provision of the lease was stricken out and initialed by him to limit the lease to one year only:

Q. The station that you had in Maple Grove, Iowa (sic), had an automatic extension, did it not?
A. I don't recall on that particular location.
Q. I'm sorry, I keep saying Iowa. It's Minnesota. That provision was stricken in the lease agreement involved here, was it not?
A. As I stated before, there was considerable difference between operating service stations in Minneapolis and operating service stations in South Dakota; Sioux Falls particularly.
Q. My question, Mr. Arnott, was that the automatic continuation period was stricken in this lease, was it not?
A. I believe so, yes.
Q. And did you initial that change?
A. Yes, I did.
Q. And the same would be true on the renewal of that lease?
A. Yes, I did.
Q. And you have read that portion over?
A. Yes. (Tr. 121-2)

V.

AMOCO'S ALLEGED MISREPRESENTATIONS, AND PLAINTIFF'S ALLEGED ACTS IN RELIANCE THEREON, DID NOT PROXIMATELY CAUSE THE LOSS OF PLAINTIFF'S STATION OR ANY OTHER LOSS.

An essential legal ingredient of the cause of action in fraud and deceit is actual injury proximately caused by reliance on misrepresentations. Without it, there can be no recovery. That ingredient of liability is completely lacking here. The only thing plaintiff claimed to have done in reliance on "misrepresentations" was to enter into a lease with defendant. The lease, plaintiff entered into was desired by and highly advantageous to plaintiff. It was not a detriment and there is no claim by plaintiff that it was. Furthermore, there is no evidence that, by reason of the lease, plaintiff was prevented from obtaining more attractive business opportunities. Entering into the lease, proximately caused no hurt, harm, or injury and no loss or damage whatever to plaintiff, but on the contrary, a great and highly desired benefit to him. Amoco's alleged misrepresentations and Arnott's act in alleged reliance thereon did not proximately cause him injury or one cent of damages.

The jury* erroneously awarded plaintiff damages not for his acts in reliance, i.e., entering into a lease on February 17, 1972, but for the later loss on August 6, 1973, of a second lease which was entered into on December 8, 1972, and which was amended on April 12, 1973.

---

* What the jury actually did cannot be determined from the verdict.

A. Plaintiff Did Not Introduce Sufficient Evidence Either Of Fact Or Amount Of Damage To Submit Any Issues To The Jury.

The jury was permitted to include in its award to plaintiff the present value of future adjusted gross income he anticipated, but for breach of fiduciary duty, false representations, nonpayment of a debt, and violation of antitrust laws. This was a basic error, in that, such adjusted gross income was (1) not a loss proximately caused by any acts of reliance, and (2) a speculative loss incapable of measurement by any sufficient proof adduced by plaintiff. The plaintiff submitted no proper evidence from which the jury could award any damages to him caused by breach of fiduciary duty or fraudulent representations.

The plaintiff's "expert's" projections of "lost income" were purely speculative and without evidentiary support. Such "expert" calculated the amount of plaintiff's damages by averaging his adjusted gross income for the years 1972 and 1973. In the 1972 and 1973 computation he included income from sources other than from the service station in issue. Plaintiff's "expert" then multiplied this 1972-1973 gross income average by plaintiff's work life expectancy of some 18.9 years in spite of the fact that plaintiff had a nonrenewable one (1) year lease that pursuant to its terms would expire on February 18, 1974. This is the type of speculation condemned in *Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd.*, 416 F.2d 71 (9th Cir. 1969), *cert. denied*, 396 U.S. 1062 (1970).

It is error to apply such methodology to situations as in the case at bar where the plaintiff is fully able to work and has options for alternative sources of income after termination of the business in question. The proper

measurement of damages is the going concern value of a destroyed business. *Standard Oil Co. v. Moore*, 251 F.2d 188, 220-221 (9th Cir. 1957), *cert. denied*, 356 U.S. 975 (1957) and *Simpson v. Union Oil Company*, 411 F.2d 897, reaffirming *Moore* at 909-910 (9th Cir. 1969), *rev. on other grounds*, 396 U.S. 13 (1969).

In *Standard Oil Co. v. Moore, supra*, the evidence was held sufficient to establish a Sherman Act violation by an agreement, combination, or conspiracy of several oil companies. However, a judgment for the dealer was reversed because of the reception of inadmissible evidence. With respect to the admissibility of certain evidence on the question of damages, the court said that the dealer's only loss was the "going concern" or "goodwill" value of his business; that the dealer retained his life expectancy business acumen after losing his business, and that neither the value of the business to him nor the profit potential of the business beyond that transferable to a purchaser had any effect on the market value of the business.

In *Simpson v. Union Oil Co., supra*, one issue was the measure of damages for Union Oil's unlawful refusal to renew a service station lease because of the plaintiff-lessee's sale of gasoline at below the price fixed by the oil company. The lessee's evidence was that he might have earned $10,500 per year at the service station, over his life expectancy of 24 years, which had a discounted value of $160,000. The jury returned a verdict for the lessee of $160,000, but the trial court granted a new trial on the ground that a $160,000 verdict for refusal to renew a one-year lease was "monstrous" and against the weight of the evidence. In affirming, the Court of Appeals said that this method of calculating damages was the same as if the lessee had been personally per-

manently disabled; and that it falsely assumed the lessee's inability to earn any other money for the rest of his life. Rather, the court said, the elements and measure of damages were (1) lost profits during the lessee's operation of the station because of the oil company's illegal restraints, and (2) the going concern value or goodwill of the operating business, or the fair market value of the business.

Plaintiff's "expert" when making his projections of future damages admittedly did not take into account: (1) the term of the lease or the fact that plaintiff could terminate on thirty days' notice (Tr. 290-1); (2) plaintiff's prior work history which reflected no lifetime commitment to operating a service station* (Tr. 291); (3) the fact that plaintiff worked 12 hours a day, 6 days a week in operating the station—a period of time comparable to holding two jobs* (Tr. 151). Plaintiff's "expert" further admitted that the numbers he used in making the future damage loss projection were not accurate:

> Q. Okay. And would you mark down the adjusted gross income Mr. Arnott derived in 1972, being the first year that he was in the station?
>
> A. Okay. That's $20,231, and that kind of roughs in right there (indicating).
>
> Q. That's for the 11 months of the year that he was in the station?

---

* Plaintiff voluntarily cancelled his lease of the Wessington Springs and later the Huron, South Dakota service stations. Plaintiff took a job with the Equitable Life Insurance Co., quit that and later went to work for the Sun Electric Company from 1966 through 1969 (Tr. 122).

** If Dr. Johnson had considered such in his calculations there would have been no loss. The "loss" was caused by plaintiff reducing his working hours, i.e., working an 8-hour, 5-day, 40-hour week, rather than a 6-day, 12-hour, 72-hour week.

A. Ten and a half, that's right, although—well, it's not quite right. He had the station for ten and a half months during that year, but the figure that I show here is the total income for 1972, so it's not just station income. It's total income during that time period.

Q. And then the adjusted gross income in 1973?

A. Was $21,258, and that, once again, is total income during that time period, not just station income.

Q. All right. Based on or including eight months of station operation?

A. Well, about seven (Tr. 257-58).

Q. Now, would you explain to the jury, please, what method you've used to use this data computed into an economic loss?

A. Okay, What I do to try to determine what the total losses of Mr. Arnott would be say out into the future is this: I take the data that I indicated I collected a little earlier in my testimony, and put this into a standard formula, a present value formula, ...

Roughly, the procedure goes something like this: I calculated the income in 1972 and 1973. 1972 and 1973, you remember, were those years during which he had the station. The other years, that is, 1971, 1974, '75, '76 and '77, were years in which he did not have the Sioux Falls station, so I averaged the income for those years, and then got a difference, say, between the two.

Then having done that, I take the difference and use the formula to get the present value of the loss that he would have sustained every year (Tr. 260).

Such calculations in this posture are pure speculation. The damage exhibits and Dr. Johnson's testimony were improperly admitted into evidence.

B. Dr. Johnson Lacked Both The Qualifications And Preparation To Testify As An Expert Witness.

Dr. Johnson conceded on cross-examination that he had no knowledge of service station operations and that service station operations were not within his field of expertise.

Q. Dr. Johnson, did you examine the leases in question?

A. No, I did not.

Q. Do you understand that they were for a term of one year, from the testimony that was in Court here?

A. From what I've heard, yes, the leases were for one year.

Q. You didn't take that into consideration, did you?

A. Well, I don't know if I can quite answer that—

Q. Can you show me on here on your calculations where you took that lease into consideration?

A. No.

Q. And you didn't take into consideration the fact that Mr. Arnott had a right to terminate the lease, did you?

A. Well, in a sense, no but there's—okay.*

Q. Now, you didn't take into consideration his past income prior to 1971?

A. I didn't have any returns for that, but you're right, no I didn't (Tr. 271-72).

---

* The lease in the instant case would have terminated, i.e., expired pursuant to its terms on February 18, 1974. It was for a one-year period only and there was no writing of any kind extending it. See SDCL 43-32-5 which provides:

"Lease of real property for more than one year—Written contract necessary. No agreement for the leasing of real property or an interest therein for a longer period than one year is valid unless the same, or some note or memorandum thereof, be in writing, signed by the lessor or his agent thereunto authorized in writing."

Q. Are you familiar with the gasoline service station business other than from what you learned in this case?

A. Well, not intimately. I purchase, you know, a certain amount of gasoline, and I have taught a little bit; in the Industrial Organization class, we have looked at the energy and oil industry some.

Q. Well, I'm talking specifically about the operation of a service station day by day, year by year.

A. No; no.

Q. All right. And you don't consider yourself an expert in that field, then?

A. No.

Q. And you've never dealt with a service station or contractual problems such as this before?

A. That's right (Tr. 292-293).

There can only be one conclusion as to Dr. Johnson's "evidence." It should have been excluded as incompetent and nonprobative and a verdict directed for defendant for lack of any evidence on damages. *Herman Schwabe, Inc. v. U.S. Shoe Machinery Co.*, 297 F.2d 906, 912-913 (2nd Cir. 1962) and cases there cited.

Dr. Johnson when making his projections of future damages admittedly did not take into account the term of the lease or the fact that plaintiff could terminate on thirty days' notice without cause (Tr. 292).

The court in *Lehrman v. Gulf Oil Corp.*, 464 F.2d 26 (5th Cir. 1972), 500 F.2d 659 (1974), did not approve the method used in the instant case to compute damages. As stated by the court in *Lehrman*, 500 F.2d at 668, in regards to Lehrman's expert:

> "His expert accountant relying on the history of the station and testimony from witnesses prepared a schedule representing sales volumes of fifteen, twenty and thirty thousand gallons per month . . . . For each volume level, profits were computed by using margins of three, four and five cents per gallon, and the margin assumptions were adequately based on the station's past experience . . . a schedule of other expenses was prepared in order to forecast the potential for net profit. Rather than relying exclusively on Lehrman's past expenses the expert accountant correlated his station expense data with that of three others with which the expert was familiar in order to establish average monthly expense data for service stations." (Emphasis added)

Dr. Johnson did no study like the expert in *Lehrman.* In any event, Dr. Johnson is better qualified than anyone else to know whether he is in fact qualified to testify as an expert witness in the instant case. Dr. Johnson admitted that he knew nothing about service station leases or the operation of service stations. Dr. Johnson further stated that he was not an expert in such areas (Tr. 292-3). Dr. Johnson thus, by his own words, was not competent to testify. His testimony was clearly inadmissible.

VI.

THE DAMAGES HEREIN ARE DUPLICATIVE.

In response to the fact that Arnott cannot sell his business and also recover future profits from that business, the panel simply makes the bald assertion that the sale was not at arms length. There is no evidence in the record to that effect. The evidence is directly to the contrary. Arnott sold his business pursuant to the provisions of the Bulk Sales Act of South Dakota, SDCL 57-24, (Tr. 139; Exhibits D, E and F).

A "Notice to Creditors" was published pursuant to SDCL 57-24-18 of such Act, notifying creditors of Arnott of such sale and that documents pertaining to such sale

had been filed and were open for inspection at the Register of Deeds Office, Minnehaha County Courthouse (Tr. 139; Exhibit D). A "Bulk Sales List of Creditors" was given under oath by Arnott in compliance with SDCL 57-24-16 (Tr. 139; Exhibit E).

Contrary to the panel's statement, Arnott was not "involuntarily thrown out of his station" but voluntarily waived the 30-day period to September 5, he was granted to cure his breach of the lease or to vacate the station and voluntarily vacated the station on August 6, 1973 (Tr. 163-4; Exhibit 29). There is no evidence of a forced sale and *there is no evidence* in the record *that Arnott could have sold his business for a higher price than the $30,638.05 he received from Mr. Sadler* (Exhibit D). That this was a fair price however is borne out by Arnott's testimony:

> A. In February of '72, the initial investment when I went into the station was $27,722.14 (Tr. 116).

See *Kestenbaum v. Falstaff Brewing Corp.*, 575 F.2d 564 (5th Cir. 1978), where the Fifth Circuit in ruling that "the trial court erred in denying the [defendant's] motion for directed verdict and so allowing [plaintiff's] goodwill testimony to go to the jury" stated:

> "When Kestenbaum sold his business, [1] *he recovered the value of his capital investment*, and [2] *he took with him the worth of his own labor.* Strict adherence to the indicated elements of goodwill proof was necessary to ensure he did not count a return from those sources as part of the goodwill he lost by selling the business, and so effect a *double* recovery." (Emphasis added)

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Supreme Court, U. S.
FILED
MAR 5 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 79-1357

THE AMERICAN OIL COMPANY,

Petitioner,

vs.

GEORGE ARNOTT,

Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 79-1150

GEORGE ARNOTT,

Appellee,

v.

THE AMERICAN OIL COMPANY, a corporation,

Appellant.

Appeal from the United States District Court
for the District of South Dakota

SUBMITTED JUNE 16, 1979—FILED OCTOBER 24, 1979

Before HEANEY, BRIGHT and STEPHENSON, *Circuit Judges.*

STEPHENSON, *Circuit Judge.*

Defendant-appellant, American Oil Company (Amoco), appeals from a judgment entered against it by the district court[1] upon a jury verdict of $100,000 (trebled by the court under the antitrust laws to $300,000 plus attorney fees and costs) and punitive damages of $25,000. Numerous issues are raised, including insufficiency of the evidence to create submissible jury issues on plaintiff's claims. We affirm on condition that plaintiff-appellee, George Arnott, file a remittitur of all damages exceeding $125,000 plus interest and costs..

[1] The Honorable Fred J. Nichol, Chief Judge, United States District Court for the District of South Dakota.

This action involves the relationship between a major oil company, Amoco (often referred to in the record as Standard Oil), and George Arnott, one of its service station dealers. On August 6, 1973, Amoco terminated Arnott as a Standard Oil dealer by terminating his lease and evicting him from the service station. Arnott's complaint alleged, and the jury found in answer to special interrogatories accompanying the general verdict, that (1) Amoco was guilty of false and fraudulent representations in inducing Arnott to execute the service station lease agreement;[2] (2) Amoco breached the fiduciary duty owed to Arnott by terminating his lease without good cause and by not dealing with Arnott in good faith during the term of the lease agreement; (3) Amoco was guilty of a retail price-fixing combination in violation of the antitrust laws; and (4) Amoco breached its promise to pay certain legal fees and expenses in the amount of $393.75 incurred by Arnott in a state court action involving a suit brought by Amoco against Arnott and the former lessee of the service station in question.[3]

I. Facts.

The record when viewed most favorably to the jury verdict for Arnott discloses the following. In October 1971 Arnott was operating a Standard Oil station in Minneapolis, Minnesota,[4] when he was approached by

[2] Arnott also claimed that during the operation of the lease agreement Amoco misrepresented the benefits to be received by Arnott from the installation of a carwash.

[3] In instructing the jury the court stated: "This is not disputed by the plaintiff (sic)." No further reference is made to this $393.75 item until Amoco in its reply brief complains that the court elected not to charge the jury on this issue and thus the judgment should be reversed. Earlier in the trial proceedings Amoco's counsel indicated there was no dispute about this item. Under the circumstances we pretermit any further discussion of the same.

[4] Prior thereto Arnott, after attending a two-week training school sponsored by Amoco, had operated Standard Oil stations at Lake Preston, Wessington Springs, and Huron,

(Footnote continued on following page)

Amoco's sales manager for the Sioux Falls district, Dick Lucas, about operating a Standard station at an interstate location in Sioux Falls, South Dakota. Arnott declined. He was again contacted by Lucas in late 1971 and, as a result, flew to Sioux Falls. Lucas showed Arnott projected profit figures on the service station which were considerably better than those from Arnott's Minneapolis station. Arnott agreed to make the change. He entered into a lease agreement dated February 18, 1972, for a one-year period. It was then a standard policy of Amoco to issue only one-year leases, but there was also evidence at the trial that these leases were routinely renewed on an annual basis if the dealer operated the station in a reasonable manner. Arnott testified that it was his understanding that as long as he operated the station in a reasonable manner and it was a profitable venture for himself and Standard Oil, he could have it for as long as he wanted, which was in accord with his experience as a Standard Oil dealer.

The lease required the service station to remain open twenty-four hours a day. There was no specific agreement that Amoco would supply any specified amount of gasoline to the station. The lease was later amended in certain details. At the time the lease was executed, Arnott was given a written Statement of Policy issued by Amoco which set out the dealer-company relationship. Arnott was familiar with it as it was read as a part of the dealer indoctrination schools which Arnott attended and was followed by Amoco at Arnott's prior Standard Oil stations.

The Statement of Policy contained several provisions which were repeatedly violated by Amoco employees.[5]

[4] *continued*
South Dakota, during the period 1960-67. He discontinued his dealership in 1967 to become a life insurance salesman. In 1970, after again attending a dealer training school, he opened the Minneapolis station.

[5] Since the Statement of Policy contained several representations which Arnott claims were false and fraudulent and

(Footnote continued on following page)

[5] *continued*
made with intent to deceive, which were relied upon by Arnott in entering into the lease agreement with Amoco, and which form the basis for his claim for damages as a result thereof, pertinent portions are set out as follows:

STATEMENT OF POLICY

> Since we first began leasing service stations to independent dealers over 35 years ago, this company has been committed to a policy which recognizes that the dealers it serves are independent businessmen who have the right to run their stations free from coercion or improper pressure on the part of any Company representative. * * *.
>
> * * *
>
> FIRST, with respect to our gasoline, we believe every dealer must use his best efforts to promote their sale to the motorist. We believe every dealer should provide prompt and courteous service and just treatment to customers, hire adequate help, maintain reasonable hours of operation and keep the premises in a clean and attractive condition.
>
> SECOND, with respect to motor oils, we expect you as a minimum to stock and display our line of oils, since most motorists who buy our gasolines also wish to purchase our motor oils. However, no Company representative may bring any pressure to bear on you if you also choose to handle some competitive brands.
>
> THIRD, with respect to tires, batteries, and accessories, you have complete freedom to buy these products from whomever and in whatever quantities you choose. The Company will not tolerate coercion, harassment, or improper pressure of any kind by our salesmen in the sale of these products. However, because we believe our line of TBA offers you an unparalleled opportunity for additional profit, we expect our salesmen to call your attention to the merits of our products and try to sell them to you.
>
> FOURTH, with respect to all products, you have an absolute right to set your own resale prices except in states where Standard Oil products are fair traded. You also are free to display and promote your products as you see fit. While we have developed a wide variety of advertising, sales promotion and merchandising programs which we believe will assist you in your sales efforts, you are free to reject them if you desire. We will, of course, give you our suggestions and advice on all of these matters based on our long experience in the business, but you alone must decide your own course of action.

The Policy provisions which the record discloses were violated by Amoco may be summarized as follows: (1) Arnott would be an independent businessman who would have the right to run his station free from coercion or pressure on the part of any company representative; (2) no company representative would bring any pressure to bear on Arnott if he chose to handle competitive brands of motor oils; (3) with respect to tires, batteries, and accessories, Arnott would have complete freedom to buy these products from whomever he chose; the company would not tolerate coercion, harassment, or improper pressure of any kind by its salesmen in the sale of these products; (4) Arnott would have the absolute right to set his own resale price with respect to all Standard Oil products, including gasoline, and would be free to display and promote all products as he saw fit; and (5) Arnott would not be pressured into participating in advertising, sales promotions, or merchandising programs sponsored by the company.

On several occasions when Arnott placed competitive brands on display along with Standard Oil products, he was instructed by Amoco to remove the same. On one occasion Arnott purchased and placed on display Goodyear tires. Amoco's highest ranking dealer representative in South Dakota, Jack Reutschler, told Arnott that he should return the Goodyear tires and display only Atlas tires (Standard's brand) if he wanted to continue to operate the station. Arnott returned the Goodyear tires and discontinued selling them. Furthermore, Arnott's purchase of Standard's motor oil from a local wholesale distributor was discontinued by the wholesaler on the instructions of Amoco, thereby requiring Arnott to purchase motor oil directly from Amoco. Arnott was also required to purchase Green Stamps, which he did at a cost of $3,000. Amoco threatened nonrenewal of his lease if he refused to do so. During the time Arnott operated his station, he received telephone calls from Amoco representatives instructing him to raise or lower his retail gasoline prices. When he deviated from Amoco pricing directives, Arnott was threatened with nonrenewal of his lease.

In addition, the evidence discloses that during the course of the lease agreement Amoco misrepresented the benefits to be received by Arnott for the installation of a car-wash. Arnott was persuaded to purchase a carwash from Amoco for $15,430. In turn, a lease rider effective June 1, 1972, was entered into whereby Arnott was to receive a minimum monthly rebate. On October 13, 1972, Amoco cancelled the carwash rider agreement and presented Arnott with a new lease that substantially increased the amount of gallonage sales necessary before a rebate could be realized. This had the effect of reducing by one-half the monthly rental rebate paid to Arnott under the carwash agreement. In addition, the carwash installation necessitated the removal of a car hoist in one of the service bays. An Amoco representative stated that a new hoist compatible with the carwash would be installed. The new hoist was never received, and thus the station's capacity for mechanical work was reduced by half.

The difficulties Arnott had with Amoco over the misrepresentations made orally and those contained in the Statement of Policy and the carwash agreement described above took place during the first year Arnott operated the station. On one occasion a representative of Amoco suggested that Arnott move to a new location which was less desirable. Arnott refused to consider it.

Arnott signed a new lease agreement on December 8, 1972, effective February 19, 1973, for an additional one-year term. Arnott was not given a copy of the executed lease until June 1973. During the interim from February through May 1973 Arnott operated the station without a lease. He was advised by Amoco representatives that he was on probation and would not be given a lease unless he agreed to abide by the prices set by Amoco and to participate in their promotional programs. Arnott agreed to be cooperative in order to secure the lease renewal.

However, the problems continued. Amoco representatives visited the station twice a week. If matters were not handled to their satisfaction, Arnott was reminded

that if he wanted to continue at his location, he would have to comply with Amoco's requirements.

The severe nationwide gas shortage which occurred in the spring of 1973 brought additional problems. On May 1, 1973, Amoco established an allocation program for each Standard Oil dealer. Arnott followed the allocation program and limited sales to customers. Nevertheless, he often exceeded his daily allocations and on several occasions ran out of gasoline.

Eventually Amoco's representative, Dick Lucas, suggested a program whereby Arnott was to place signs up in the daytime indicating that he was out of gasoline and then in the evening, when the service stations downtown would close, he was to remove the signs and sell gasoline. The purpose was to send motorists downtown in the daytime. Arnott refused because the costs were prohibitive. His main product was gasoline. To remain open during the daytime for oil changes and grease jobs was too costly.

During the last two weeks of his operation Arnott ran out of gasoline most evenings and eventually closed the station because it was not profitable to remain open. In addition, customers became very irate after pulling into the station only to find gasoline unavailable.

Arnott advised Amoco of his situation and that he was closing down from 10:00 p.m. to 6:00 a.m. However, Amoco advised Arnott that he was in violation of the lease in failing to maintain a 24-hour operation.

Arnott became frustrated, and on July 17, 1973, he signed a cancellation agreement to voluntarily leave the station. Later in the day he reconsidered his position and called an Amoco representative to rescind his consent to the cancellation. A few days later Amoco marketing representative, Clint Bucklin, told Arnott that if he cooperated with Amoco's policies, he could keep the station. The next day Bucklin advised Arnott that Bucklin apparently had acted without authority and that Arnott would be removed August 6, 1973. A formal letter to that effect dated July 26, 1973, was mailed to Arnott,

who then retained counsel. Amoco was advised by letter that its August 6 takeover was being treated by Arnott as an involuntary cancellation of the lease. Arnott left the station August 6, 1973. On that date Amoco hand-delivered a letter to Arnott advising him that his lease was being cancelled effective September 5, 1973, because of violation of the 24-hour clause in the lease. Subsequently Amoco leased the station to J. K. Sadler, and Arnott sold his Standard Oil inventory and carwash to the new lessee. Additional facts disclosed by the record will be reviewed in connection with discussion of the issues raised by Amoco in this appeal.

II. Fraud and Deceit.

Amoco initially contends that there is no evidence of any misrepresentations, much less evidence of misrepresentations of a material fact; no evidence that the statements claimed to be false were knowingly false when made; and no evidence of an intent to defraud. These contentions have already been answered in our discussion of the facts above and require no further elaboration. We of course view the evidence together with all reasonable inferences to be drawn therefrom in the light most favorable to the jury verdict. After reviewing the record, we are inclined to agree with the statement made by the district court in denying Amoco's motion for a directed verdict:

> I must confess that I'm somewhat shocked with the manner in which the evidence shows that the Standard Oil Company undertook to negotiate the lease, and to try to, in its dealings with the dealer in connection with its lease, to completely frustrate the antitrust law, and the decisions under it, in the manner in which they did this.
>
> First of all, they go and get this—they negotiate this lease. They put as an addendum to the lease a receipt acknowledging that the lessee has received a copy of the policy statement of the Standard Oil. * * * And then they proceed to violate practically

> every single one of the paragraphs in the policy statement.

Fraud, like other issues of fact, may be established by inferences arising from all the other facts and circumstances in evidence. *Aschoff v. Mobil Oil Corp.*, 261 N.W.2d 120, 124 (S.D. 1977); *Funke v. Holland Furnace Co.*, 102 N.W.2d 668, 670 (S.D. 1960). The record amply supports the jury finding, implicit in its verdict and answer to the pertinent interrogatories, that Amoco was guilty of misrepresentations of a material fact, that the misrepresentations were known to be false when made and were made with intent to defraud, and that Arnott relied thereon in entering into a lease agreement with Amoco.

Amoco further contends that in any event Arnott's reliance thereon did not proximately cause the loss of his station or any other loss because the initial lease had expired. The short answer is that Arnott, based on his previous experience operating Standard stations and on representations made by Amoco's Dick Lucas prior to Arnott's leaving Minneapolis and entering into the first Sioux Falls lease, was led to believe that he was entering into a dealership with excellent prospects for an extended period of time as long as he performed satisfactorily as a dealer. Under the circumstances, the jury could find that the mere fact that the initial lease had been amended to provide for the carwash installation and had later been renewed by a second one-year lease did not deprive Arnott of his anticipated long-term dealer relationship with Amoco at the new location.

Amoco's contention that the testimony regarding the alleged misrepresentations violated the parol evidence rule is not well taken. Such testimony is permitted when a contract is induced or procured by fraud. *Sabbagh v. Professional & Business Men's Life Ins. Co.*, 116 N.W.2d 513, 520 (S.D. 1962).

Amoco additionally contends that even if the representations claimed to be fraudulent were fraudulent, they were made prior to the execution of the renewal lease,

which was executed on December 8, 1972, for an additional one-year period, and that Arnott had full knowledge of such falsity when he executed the new lease and the amendments thereto concerning the carwash. Thus Arnott waived any right to sue for such alleged fraudulent representations; *see Taute v. Econo-Car Int'l, Inc.*, 414 F.2d 828 (9th Cir. 1969); *Commodity Credit Corp. v. Rosenberg Bros. & Co.*, 243 F.2d 504, 512 (9th Cir.), *cert. denied*, 355 U.S. 837 (1957); and Arnott is estopped from questioning the validity of the lease agreement and provisions therein. *See Schutterle v. Schutterle*, 260 N.W.2d 341, 350 (S.D. 1977). Moreover, Arnott entered into an accord and satisfaction with Amoco by the negotiation and execution of the lease rider agreements and acceptance of payments thereunder. S.D. Compiled Laws §§ 20-7-1, et seq. (1967).

The district court fully instructed the jury on the defenses urged by Amoco of waiver, estoppel, and accord and satisfaction. The instructions were proposed by Amoco. Each defense involved factual issues which were determined against Amoco by the jury. The record amply supports the jury's resolution of these issues. For example, it can hardly be said on this record that Arnott, with full knowledge of the fraud, asked for and received a material concession from Amoco. *See United Forest Prod. Co. v. Baxter*, 452 F.2d 11 (8th Cir. 1971). The matter of the amount of damages proximately caused by Amoco's fraud and deceit will be discussed under "V. Damages," *infra*.

III. Fiduciary Relationship.

Arnott alleged that Amoco breached the fiduciary duty owed to Arnott by terminating his lease without good cause and by not dealing with Arnott in good faith during the lease term. The court instructed the jury that a fiduciary relationship existed between the defendant

and the plaintiff.[6] Amoco contends that the evidence does not support the existence of a fiduciary relationship and that the court erred in instructing that the relationship existed as a matter of law. Further, Amoco argues that it properly terminated Arnott's lease for failure to maintain a 24-hour operation as set out in the lease.[7]

[6] [Y]ou are instructed that a fiduciary relationship existed between the defendant and the plaintiff. A fiduciary relationship is one founded on trust or confidence placed by one person in the integrity and fidelity of another person. Out of such a relation, the law requires that neither party exert undue influence or pressure upon the other, take selfish advantage of his trust or deal with the subject matter of the trust in such a way as to benefit himself or prejudice the other except in the exercise of the utmost good faith and with the full knowledge and consent of the other person involved.

[7] In this connection the district court further instructed the jury *inter alia*:

> If you find that the circumstances presented during the time period in question were such that the reason for maintaining a 24-hour operation could not be fulfilled, then you may consider that fact in deciding whether the plaintiff substantially performed his obligations under the terms of the lease, notwithstanding his failure to maintain a 24-hour operation.
>
> You are instructed that under the laws of the State of South Dakota that the terms of the contract may be implied if manifested by the conduct of the parties. Therefore, if you should find that under all facts and circumstances presented, that the defendant's conduct implied that it would supply plaintiff with sufficient quantities of gasoline and other petroleum products to enable the plaintiff to maintain a 24-hour operation, then you may also find that the defendant's failure to fulfill that implied condition would excuse the plaintiff's failure to maintain a 24-hour operation of the station.
>
> You are instructed that under the laws of the State of South Dakota the failure of a party to perform under the terms of an agreement is excused when the party's performance is prevented by the act of the other party, or by the operation of law.

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Although the existence of a fiduciary relationship is a close question, the dealer-oil company relationship has been the subject of much recent litigation, and the current trend of authority recognizes that a franchise relationship exists between a service station dealer and the oil company whose trademark the dealer is promoting. Inherent in a franchise relationship is a fiduciary duty.

A New Jersey court ruled that a franchise existed between tenant-dealer Marinello and landlord Shell Oil Co. in *Shell Oil Co. v. Marinello*, 294 A.2d 253 (N.J. Super. 1972), *aff'd*, 307 A.2d 598 (N.J. 1973), *cert. denied*, 415 U.S. 920 (1974).

> The fact that Shell here asserts its rights as a landlord to terminate a lease is not the end of the inquiry. It is now recognized that a lease is simply a species of contract which happens to concern real estate, and we must determine under principles of contract law the construction of the document in question in a manner consistent with the true intent and purpose and the reasonable expectations of the parties as suggested not only by the contents of the instrument but the whole of the relationship that existed between them. * * *.
>
> Furthermore, it should be apparent that we are not dealing here with a traditional landlord-tenant relationship but with what is essentially a form of commercial venture—a franchise—for the

[1] *continued*

The district court further instructed as follows as to the essential elements which plaintiff must establish:

> First, that the defendant terminated its lease with the plaintiff without good cause. In this regard, good cause is defined as the failure by plaintiff to substantially perform his obligations to the defendant under the terms of the lease;
>
> Second, that as a direct and proximate result of the defendant's termination of the lease, the plaintiff suffered a loss; and
>
> Third, the monetary amount of that loss.

> marketing of Shell's products, in which both parties have a common interest and profit from the activities of the other. Shell's interest in these premises is obviously more than the interest of a landlord, and Marinello's interest transcends that of a tenant—his investment and very livelihood depend on his remaining within the good graces of Shell's local employees who, as the record here demonstrates, exercise final and absolute authority over his tenure as a Shell dealer.

Id. at 261 (citations omitted). *See Amerada Hess Corp. v. Quinn*, 362 A.2d 1258 (N.J. Super. 1976).

More recently, the Pennsylvania Supreme Court determined in *Atlantic Richfield Co. v. Razumic*, 390 A.2d 736 (Pa. 1978), that while the dealer and oil company were landlord and tenant, their lease and business practices indicated a franchise relationship. The court defined a franchise as a license from the owner of a trademark which permits another to sell a product or service under the name or mark. *Id.* at 740, *quoting from Piercing Pagoda, Inc. v. Hoffner*, 351 A.2d 207, 211 (Pa. 1976). Razumic purchased fuel and other products from Arco and resold them under the Arco trademark. Razumic was required to have his station open twenty-four hours a day, to maintain adequate and efficient attendants, and to allow Arco to inspect the station.

The course of performance pursuant to the agreement between the parties was considered a strong indication of their relationship. *Id.* at 741 n.6. Because the facts showed the actual practice of a franchise relationship, the court did not feel it was significant that the service station lease had not specified a franchise relationship. In ruling that a franchise relationship existed, the court determined that "it is clear that Razumic was not pursuing solely his own business interests. Rather, Razumic conducted his business and sold his products in accordance with methods prescribed by Arco." *Id.* at 740.

It is likewise clear that Arnott was not pursuing solely his own business interests in his relationship with

Amoco. Arnott sold Amoco products under the Amoco trademark, was expected to remain open twenty-four hours a day, was responsible for hiring adequate help, and was subject to inspections from Amoco representatives. Further examples of Amoco's control are Amoco's pricing directives, Amoco's requirement that Arnott purchase Green Stamps, and Amoco's control over Arnott's product advertising as indicated by the forced return of the Goodyear tires. Obviously, a franchise relationship in which Arnott and Amoco had a common interest and profit in the activities of each other, and not the typical landlord-tenant relationship, existed.

A franchisee, unlike a tenant pursuing his own interests, builds the goodwill of his own business and the goodwill of the franchisor. *Atlantic Richfield Co. v. Razumic*, supra, 390 A.2d at 742. This facet of the relationship has led to the recognition that the franchise relationship imposes a duty upon franchisors not to act arbitrarily in terminating the franchise.

> [A]n Arco dealer such as Razumic can justifiably expect that his time, effort, and other investments promoting the goodwill of Arco will not be destroyed as a result of Arco's arbitrary decision to terminate their franchise relationship. Consistent with these reasonable expectations, and Arco's obligation to deal with its franchisees in good faith and in a commercially reasonable manner, Arco cannot arbitrarily sever its franchise relationship with Razumic. A contrary conclusion would allow Arco to reap the benefits of its franchisees' efforts in promoting the goodwill of its name without regard for the franchisees' interests.

Id. at 742 (footnote omitted). *See Seegmiller v. Western Men, Inc.*, 437 P.2d 892 (Utah 1968); *Ashland Oil, Inc. v. Donahue*, 223 S.E.2d 433 (W.Va. 1976); Brown, *Franchising—A Fiduciary Relationship*, 49 Tex. L. Rev. 650 (1970-71).

In *Shell Oil Co. v. Marinello, supra*, 294 A.2d at 262, 263, the court ruled that public policy required a term to be implied in the service station lease that the lessor cannot refuse to renew the lease without good cause. The court stated:

> Surely no person would make the kind of investment in money, time and effort as did Marinello without the reasonable expectation that if he substantially performed his obligations to Shell, the latter would in turn continue to renew his lease and dealership. He was, by virtue of Shell's dominant position in their relationship and the legal structure of the agreements whose terms he could not vary, compelled to rely upon Shell's good faith in living up to these expectations.

Id. at 262.

Further indication of the fiduciary nature of a franchise relationship is found in the recent surge of general franchise legislation. As of May 1, 1977, legislation under which franchisors are prohibited from terminating franchises prior to the end of their terms without good cause, are required to make payments for goodwill if franchises are terminated or not renewed at the end of their term, or are prohibited from failing to renew franchises at the expiration of their terms without good cause has been adopted in twelve states and Puerto Rico. Baird, Hay & Bailey, *Government Regulation of Real Estate Franchising*, 112 Real Prop., Prob. & Tr. J. 580, 594 (1977). Congress has recently enacted legislation specifically regulating the relationship between service station dealers and their franchisors in the Petroleum Marketing Practices Act, 15 U.S.C. § 2801, *et seq.* (1978). "Congress sought to remedy a situation which had led to 'numerous complaints by franchisees of unfair terminations or nonrenewals of their franchises by franchisors for arbitrary and even discriminatory reasons.' " *Saad v. Shell Oil Co.*, 460 F. Supp. 114, 115 (E.D. Mich. 1978), *quoting from* S.R. 95-731 at 17. The Act prohibits the franchisor from terminating or failing to renew a franchise relationship

except under specific conditions and for specific grounds. *Frisard v. Texaco, Inc.*, 460 F. Supp. 1094, 1097 (E.D. La. 1978).

South Dakota, in accord with this modern trend, enacted the South Dakota Franchise Act, S.D. Compiled Laws, ch. 37-5A (1977) in 1974. South D. Compiled Laws § 37-5A-66(7) (1977) prohibits unfair or inequitable terms or conditions in franchise agreements and unfair or inequitable practices by the franchisor. Although this statute is not controlling since the Arnott lease agreement was initiated in 1973, it is relevant in determining South Dakota's position regarding franchise terminations. In both *Shell Oil Co. v. Marinello, supra*, 294 A.2d at 263, and *Atlantic Richfield Co. v. Razumic, supra*, 390 A.2d at 743, the courts' decisions relied on the public policy exemplified by the state statutes though the statutes were not controlling because they were enacted after the parties had established their franchise relationships. The statutes were viewed as reinforcing the obligations inherent in a franchise relationship. The South Dakota statute indicates that in South Dakota unfair or inequitable practices by a franchisor will not be tolerated. South Dakota law therefore indicates that the franchisor and franchisee of a service station operation are involved in a fiduciary franchise relationship whereby the parties should act with good faith toward each other. Judge Nichol, during an informal discussion of Amoco's motion for a directed verdict, indicated it was his view that South Dakota, in enacting the 1974 Franchise Act, "was codifying what was really the common law in South Dakota, anyway." It was the court's opinion that, in light of Amoco's superior position in dictating the terms of the lease agreement, the relationship of the parties was a matter of law.[8] We give great weight to the district court's view

[8] It is true, as Amoco contends, that the court's instruction was taken from *Mobil Oil Corp. v. Rubenfeld*, 72 Misc.2d 392, 339, N.Y.S. 623 (N.Y. 1972), a case in which the determination that a fiduciary relationship existed between the dealer

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of state law. *American Motorists Ins. Co. v. Samson*, 596 F.2d 804, 807 (8th Cir. 1979); *Gatzemeyer v. Vogel*, 544 F.2d 988, 992 (8th Cir. 1976).

In light of the undisputed facts in this case, it is our view that the district court did not err in instructing that a fiduciary relationship existed between the parties and in instructing that the law requires that neither party exert undue influence or pressure upon the other. *See* note 6 *supra*. In any event, when the instructions on breach of fiduciary duty are considered as a whole, error, if any, was harmless. *See* note 7 *supra*.

We are satisfied that the evidence amply supports the jury's finding that Amoco breached its "fiduciary" duty of good faith and fair dealing with Arnott in terminating its lease agreement with Arnott without good cause and that as a direct and proximate result of the termination Arnott suffered damages.

IV. Violation of the Antitrust Laws.

Arnott charged that during the time he operated his service station, various Amoco representatives instructed him to raise or to lower his retail gas prices to specified levels at specified times; that when he did attempt to vary his retail gasoline prices from those specified by Amoco, he was threatened with cancellation or nonrenewal of his short-term station lease; that as a result of Amoco's price-fixing activities he lost profits on gasoline sales during the term of his lease; and that his lease was cancelled because, among other reasons, he failed to follow the pricing directives of Amoco

[8] *continued*
and the oil company was reversed on appeal. In reversing, however, the court noted that the New York legislature had passed a franchise statute, but the bill was vetoed by the governor and did not become law. The court concluded that New York, therefore, had negated any fiduciary policy of termination only for cause by failing to enact the statute. *Mobil Oil Corp. v. Rubenfeld*, 370 N.Y.S.2d 943, 949 (Sup. Ct. 1975). This is plainly distinguishable from the instant case due to South Dakota's Franchise Act.

representatives, thereby causing him loss of his business and loss of future profits.

Amoco denied that it violated any antitrust laws or that it attempted to infringe upon or restrict free trade or fix prices to restrain competition or otherwise. By way of affirmative defense, Amoco alleged that Arnott made his own judgment regarding operation of the station; that if there were any representations made in connection with gasoline prices, Arnott, by renewal of his lease and riders thereto, acquiesced in such conduct and cannot now be heard to complain; and that the lease itself gave Amoco the absolute right to terminate the same on any material violation thereof, which it contends occurred when Arnott failed to operate said station twenty-four hours a day, seven days a week, as specified in the lease.

Amoco contends that there was insufficient evidence to create a submissible jury issue on price-fixing. We disagree. Although there were conflicts in the testimony of other dealers as to whether Amoco's calls regarding retail prices for gasoline were merely suggestions, there was sufficient evidence upon which a jury could find that retail prices were dictated by Amoco. For example, Mrs. Bill Pasco testified that she and her husband operated a Standard station in the same general area during the same period and that they would receive calls from Amoco representatives stating what price should be posted. She added, "I would say it was not a suggested price." If they deviated, "we would be checked, and my husband, he would have conversation with them. * * * We would take and put our prices where they had stated." Similarly, Greg White, who operated a Standard station in Sioux Falls during the relevant period, testified that representatives of Amoco would call, stating "your cost is this, and your selling price is this." At times when he deviated, he received calls from Standard representatives: "That—you know, we should fall in line with other dealers. * * * They'd remind you next February your lease is coming up."

Arnott testified that representatives of Amoco would call and tell him what the retail price was to be, and when he failed to comply, he would receive further calls advising him that he was not in compliance; that his second one-year lease was withheld during February-May 1973 and he was placed on probation until he agreed to abide by the prices set by Amoco; and that a couple of days after Arnott in frustration signed a mutual cancellation agreement and then rescinded the same, he was advised by an Amoco representative that he could keep the station if he cooperated with resale pricing and other directives. Shortly thereafter, by letter dated August 6, 1973, Amoco notified Arnott that it was cancelling his lease effective September 5, 1973, for failure to keep the station open for operation twenty-four hours a day. Arnott's testimony with respect to coercion by Amoco's representatives in connection with the fixing of the retail price of gasoline was also corroborated by the testimony of former employees. The witnesses generally testified in terms of Amoco "fixing prices"; one witness described Arnott's price as usually being "one cent higher."

Any resale price-fixing, whether by combination or agreement, is a per se violation of section 1 of the Sherman Act, 15 U.S.C. § 1.[9] In *Albrecht v. Herald Co.*, 390 U.S. 145 (1968), the Supreme Court noted that "agreements to fix maximum prices 'no less than those to fix minimum prices, cripple the freedom of traders and thereby restrain their ability to sell in accordance with their own judgment.'" *Id.* at 152, *quoting from Kiefer-Stewart Co. v. Seagram & Sons*, 340 U.S. 211, 213 (1951). Furthermore, "a supplier may not use coercion on its retail outlets to achieve resale price maintenance. * * * [I]t matters not what the coercive device is." *Simpson v. Union Oil Co.*, 377 U.S. 13, 17 (1964).

In *United States v. McKesson & Robbins*, 351 U.S. 305 (1956), the Supreme Court emphasized:

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[9] 15 U.S.C. § 1 reads in part: "Every contract, combination * * * or conspiracy, in restraint of trade or commerce among the several States * * * is declared to be illegal[.]"

> It has been held too often to require elaboration now that price fixing is contrary to the policy of competition underlying the Sherman Act and that its illegality does not depend on a showing of its unreasonableness, since it is conclusively presumed to be unreasonable. It makes no difference whether the motives of the participants are good or evil; whether the price fixing is accomplished by express contract or by some more subtle means; whether the participants possess market control; whether the amount of interstate commerce affected is large or small; or whether the effect of the agreement is to raise or to decrease prices.

Id. at 309-10 (footnotes omitted).

In *Albrecht v. Herald Co., supra,* 390 U.S. at 149, the Supreme Court in discussing *United States v. Parke, Davis & Co.*, 362 U.S. 29 (1960), observed: "The combination with retailers arose because their acquiescence in the suggested prices was secured by threats of termination; the combination with wholesalers arose because they cooperated in terminating price-cutting retailers."

In the instant case there is evidence from which the jury could find that Arnott and other dealers were forced by means of threats and other coercive tactics to set gasoline retail prices at prices fixed by Amoco. Amoco's threat not to renew the annual lease was enough to make the dealers toe the line. In this context the suggested price became the required price. *See Lehrman v. Gulf Oil Corp.*, 464 F.2d 26, 37-41 (5th Cir.), *cert. denied*, 409 U.S. 1077 (1972); *Phillips v. Crown Central Petroleum Corp.*, 395 F. Supp. 735, 760-64 (D. Md. 1975).

The jury could find from the evidence in the case that Amoco's actions constituted an unlawful combination under either of two theories: (1) That a combination existed between Amoco and Arnott at those times he complied, even though unwillingly, with Amoco's pricing directives; and (2) that Amoco had combined with other dealers who acquiesced in the enforced pricing policy.

Albrecht v. Herald Co., supra, 390 U.S. at 150 n.6. We are satisfied that the evidence supports the jury finding of price-fixing in violation of the Sherman Act.

Amoco further urges that Arnott failed to show a causal connection between the alleged unlawful price-fixing combination and the termination of his lease. We cannot agree. The evidence discloses that a representative of Amoco told Arnott that he could keep the station if he were more agreeable in adhering to Amoco's pricing policies. It is also noted that other dealers were allowed to reduce their hours of operation during the gasoline shortage. The jury could infer that Arnott's failure to follow Amoco's pricing directives was the proximate cause of the termination of his lease and subsequent loss of income as a result thereof.

V. Damages.

Initially Amoco contends that Arnott has failed to establish the fact of damage resulting from unlawful acts on the part of Amoco. The fact of damage arising from Amoco's price-fixing activities has been discussed above. Arnott's claim for damages arising out of his contention that Amoco fraudulently induced him to enter into the lease agreement is also based on wrongful termination of the lease. He testified that he sold his home and his business in Minneapolis and acquired the dealership in Sioux Falls upon the representations of Amoco that as long as he operated the service station in a reasonable manner and it was a profitable venture for himself and Standard Oil, he could continue to operate the station. The fact of damage is Arnott's loss of a profitable business caused by Amoco's wrongful termination of the lease.

VI. Amount of Damages.

Arnott's claim for damages on all three complaints of Amoco's (1) fraudulent misrepresentations in inducing him to enter into the lease agreement, (2) breach of fiduciary duty, and (3) violation of the antitrust laws is

based on loss of future profits. In this connection Arnott offered the expert testimony of Dr. Dennis Johnson, Professor of Economics at the University of South Dakota. Basically Dr. Johnson computed Arnott's average income with the Standard station during the years 1972-73 and compared the same with Arnott's average income without the station in 1971 and 1974-77. The figures were obtained from Arnott's income tax returns. After computing the difference of $11,886, Dr. Johnson multiplied the figure by Arnott's work life expectancy from the date the lease was terminated, with an allowance for productivity increase, and reduced it to its present value of $318,622.[10] Johnson used adjusted gross income in making his computations.

Amoco contends that the expert's projection of loss of income was speculative and completely erroneous because Arnott had a nonrenewable one-year lease which by its terms would expire February 18, 1974; further, that the proper measure of damages is the going concern value of a destroyed business. Amoco relies on *Albrecht v. Herald Co.*, 452 F.2d 124, 129-31 (8th Cir. 1971), for the proposition that there can be no recovery for loss of future profits as such; such profits may be considered only for purposes of determining lost value of business by using the capitalized profit method of valuation. The difficulty with Amoco's analysis of the *Albrecht* case is that it overlooks the fact that the district court in *Albrecht* permitted the jury to make an award based on the difference between the fair market value at the time of sale and the actual sale price received, *plus* the loss of future profits. *Albrecht v. Herald Co.*, 321 F. Supp. 99 (E.D. Mo. 1970), *modified*, 452 F.2d 124 (8th Cir. 1971). In reversing the district court, this court held that it was improper to permit a plaintiff damaged by an antitrust violation to recover both the value of the business as a going concern at the time of the damage and future profits of that business after the time of the damage. Future profit potential is taken into consideration in valuing the business as a going concern.

[10] The jury's award of actual damages was $100,000.

In the instant case it must be acknowledged that Arnott cannot sell his business for the fair market value and also recover future profits. However, the record demonstrates that Arnott's sale of his inventory to the new lessee selected by Amoco was not a willing buyer-willing seller transaction. Under Amoco's supervision, Arnott sold his Standard Oil inventory to the new lessee, a former Standard Oil salesman from Chamberlain, South Dakota, Jay Sadler. Arnott's initial investment in February 1972 was $27,722.14, and he sold the inventory to Sadler for $30,638.05. The jury could infer from all of the circumstances that it was a forced sale with no allowance for goodwill or the value of a going business and therefore that Arnott had not received the fair market value of his business.

In *Albrecht v. Herald Co., supra*, 452 F.2d at 128-29, the court discussed numerous cases in which future profits were allowed and used as a method of calculating the damage to the value of the business involved because no other reliable method of valuing the business was presented.[11] In *Lehrman v. Gulf Oil Corp.*, 500 F.2d 659 (5th Cir. 1974), *cert. denied*, 420 U.S. 929 (1975), the court recognized that going concern value and lost future profits are viable alternative measures of antitrust damages.

> Clearly, going concern value and lost future profits are each viable alternative measures of antitrust damages. Future profits cannot be condemned as inordinately more speculative than the going concern value since the former is a crucial component of the latter. In addition going concern or goodwill value may present difficult problems of proof if the lessor of a particular station places restrictive con-

[11] Cases discussed were *Lessig v. Tidewater Oil Co.*, 327 F.2d 459 (9th Cir.), *cert. denied*, 377 U.S. 993 (1964); *Osborn v. Sinclair Ref. Co.*, 324 F.2d 566 (4th Cir. 1963); *Atlas Bldg. Prod. Co. v. Diamond Block & Gravel Co.*, 269 F.2d 950 (10th Cir. 1959), *cert. denied*, 363 U.S. 843 (1960); and *Twentieth Century Fox-Film Corp. v. Brookside Theater Corp.*, 194 F.2d 846 (8th Cir.), *cert. denied*, 343 U.S. 942 (1952).

> ditions on the transfer of the lease. Finally, future profits accompanied by an award for any decline in asset values will often more fully compensate a businessman by measuring his lost earnings, not just what it is worth to someone else to reach for those earnings.

Id. at 663-64 (footnotes omitted). *See Lehrman v. Gulf Oil Corp.*, 464 F.2d 26, 43-44 (5th Cir.), *cert. denied*, 409 U.S. 1077 (1972).

Amoco argues that the short-term nature of the lease limits future damages. However, this ignores the evidence from which the jury could properly infer Arnott's long-term expectations, based on future profit projections related to him prior to execution of the first lease and the custom and practice of long-term renewals known to Arnott through his prior experience with Amoco. The trial court instructed the jury that it should consider the terms and conditions of the lease and all other testimony concerning renewals. We cannot say the evidence does not support a finding that Amoco's actions indicated a long-term intention or fraudulent misrepresentation of such an intention.

There was a factual dispute concerning the duration and the reasonableness of Arnott's expectations. As stated in *Lehrman v. Gulf Oil Corp.*, *supra*, 464 F.2d at 47:

> The duration of the period during which the plaintiff might be expected to profit will vary from case to case; it is susceptible of no precise formulation, and must be left to the processes of the jury informed by the presentation of conflicting evidence. Of course, the court might properly instruct the jury that it may consider as one factor in its deliberations the length of time which the plaintiff had been in business as of the time of the defendant's anticompetitive actions; but the youth of a business, like the precise manner of its doing-in, will never alone be enough to justify severe restrictions upon the duration of damages. The court may

> condition a new trial on remittitur if it feels strongly that the jury verdict is excessive. But it is arbitrary and improper to limit damages as a matter of law to the precise period of the plaintiff's business operations if the reason for that limitation is either the means used to drive the plaintiff out of business or the relatively short history of his business before its demise.

Finally, with respect to the damage issue, Amoco contends that Dr. Johnson was not qualified to testify as an expert witness. The contention is without merit and requires little comment. The thrust of Amoco's contentions is a rehash of its argument that the fact that the lease provided for a one-year term is controlling and therefore computations with respect to loss of future profits should not have been admitted. Dr. Johnson made computations with respect to Arnott's work life expectancy and loss of income and reduced the same to present value. The weight to be given thereto was a jury matter. We find no abuse of discretion by the trial court in admitting such testimony for whatever assistance it might give to the jury in weighing the evidence with respect to damages. *Cf. Holmgren v. Massey-Ferguson, Inc.*, 516 F.2d 856 (8th Cir. 1975).

VII. Instructions.

Appellant makes the broad allegation that the court's instructions were basically erroneous and supports this allegation with a lengthy enumeration of alleged errors in the instructions themselves and in the court's failure to give proposed instructions. In effect, appellant is merely repeating the argument that the evidence offered did not create a submissible case. We deem it sufficient to say that we have reviewed the instructions in detail and, when considered as a whole, we are satisfied that the issues were properly submitted to the jury.

VIII. Verdict Ambiguity.

The jury returned a general verdict in favor of Arnott and against Amoco in the sum of $100,000 actual or

compensatory damages and punitive and exemplary damages of $25,000. The jury further answered special interrogatories with respect to liability only against Amoco:

> Did you find Defendant American Oil Company liable based on:

			(yes) or (no)
a.	False and fraudulent representations	ANSWER	Yes
b.	Breach of fiduciary duty	ANSWER	Yes
c.	Violation of antitrust laws	ANSWER	Yes
d.	Atty's. fees in State Court Action	ANSWER	Yes[12]

The district court trebled the $100,000 actual or compensatory damages in view of the jury's finding of liability under the antitrust laws.

Amoco contends that the verdict is ambiguous and that the court must speculate as to its meaning; there is no way of determining what portion of the lump sum damages was allotted to each item; it cannot be assumed that $100,000 was properly attributable to the antitrust claim; the court erred in trebling the award; and therefore a new trial must be ordered. *See Rea v. Ford Motor Co.*, 497 F.2d 577, 579 (3d Cir.), *cert. denied*, 419 U.S. 868 (1974). Furthermore, the court awarded treble damages in the amount of $300,000 and allowed the punitive damages of $25,000 to stand, thus making a total award of $325,000. Punitive and treble damages cannot both be awarded for violation of the antitrust laws. *Hansen Packing Co. v. Armour Co.*, 16 F. Supp. 784, 788 (S.D.N.Y. 1936).

[12] Attorney fees in state court action were conceded not to be in dispute, so there will be no further discussion thereof. *See* n.3 *supra*.

Arnott argues that the jury found for him on all three counts[13] submitted to it and that the sole evidence of damages offered was the same on all three counts—loss of future profits. Arnott also points out that prior to making the record on instructions, Amoco asked for interrogatories on the issues of liability, which were granted, and that the trial court inquired of Amoco counsel whether they cared to propose any interrogatories on damages, which they did not. We cannot consider the latter argument because the inquiry and response were not made on the record. However, counsel for Amoco does concede, and the record indicates, that no objection was made by Amoco to the verdict form except the general objection that there were no submissible jury issues. Under the circumstances the failure of Amoco to request any instructions or special interrogatories on damages or to make objection to the general verdict form results in a waiver of such objections on appeal. Fed. R. Civ. P. 51; *Missouri Pac. R.R. v. Star City Gravel*, 592 F.2d 455 (8th Cir. 1979); *see Richardson v. Communications Workers*, 486 F.2d 801, 804-05 (8th Cir. 1973). Amoco also failed to object or seek clarification when the verdicts were rendered[14] and therefore waived objection to the form of the verdict. *See Tennessee Consol. Coal Co. v. United Mine Workers*, 416 F.2d 1192, 1200-1201 (6th Cir. 1969), *cert. denied*, 397 U.S. 964 (1970).

It is our task to determine if it was plain error for the court not to instruct the jury with respect to awarding damages separately as to each count and not to submit interrogatories or verdict forms as to the amount of damages found on each count. Any plain error exception to Fed. R. Civ. P. 51 is "'confined to the exceptional case where the error has seriously affected the fairness, integrity, or public reputation of judicial proceedings.'"

[13] *See* n.12 *supra*.

[14] Counsel for Amoco was present when the jury returned its verdicts and in fact requested that each juror be individually polled on each and every interrogatory and verdict.

2 Barron and Holtzoff, Federal Practice and Procedure 475 (1961 ed.), *quoted in Horace v. St. Louis Southwestern R.R.*, 489 F.2d 632, 634 (8th Cir. 1974).

We are persuaded that the failure of the trial court to submit verdict forms or interrogatories on each theory of recovery prevented it from trebling the $100,000 actual damages awarded in the general verdict. It would be purely speculative to assume that the entire general verdict of $100,000 was awarded as damages resulting from violation of the antitrust laws. We are, however, satisfied that the evidence amply supports an award of $100,000 actual and compensatory damages on any of the three counts of (1) false and fraudulent representations, (2) breach of fiduciary duty, and (3) violation of the antitrust laws.[15] We are also persuaded that the jury's award to Arnott and against Amoco of punitive and exemplary damages in the sum of $25,000 is supported by the record.

Upon condition that appellee George Arnott file a remittitur within thirty days hereof of that portion of the judgment in excess of $125,000, plus interest and costs from the date judgment was entered herein, the judgment is affirmed. Otherwise this cause is remanded for a new trial.

Affirmed on condition that a remittitur be filed.

[15] Although not raised by the parties, we suggest that if a new trial occurs, the better practice is to omit from the jury instructions any reference to the trebling of damages in connection with the recovery of damages under the antitrust laws. *See* Devitt & Blackmar, 3 Federal Practice and Instructions § 90.39 (3d ed. 1977).

BRIGHT, *Circuit Judge*, concurring and dissenting:

I concur in the result reached by the majority, but only because I believe that substantial evidence in the record supports the jury verdict on the claim of fraud and because I believe that the payment of the suggested remittitur would constitute a reasonable resolution of this litigation.[1] I do not believe that, as a matter of law, a fiduciary relationship existed between the parties in this case, nor do I believe that the evidence demonstrates a violation of the antitrust laws. Because the majority's reasoning on those issues appears to me to be in error and because this case may be retried, I set forth my views in dissent.

I. *The Relationship Between the Parties.*

The district court twice instructed the jury that, as a matter of law, a fiduciary relationship existed between Arnott and Amoco, requiring Amoco to act for itself only with utmost good faith and the full knowledge and consent of Arnott. These strictures, though appropriate in the case of a trustee, should not be applied to a commercial lessor. Rather, the lessor should he held to the rules governing contracts in general. It is true that a franchisor might have other duties. But only if the evidence shows a relationship between lessor and lessee extending significantly into other areas is it necessary or desirable to characterize their arrangement as a franchise. Even then one must determine which of the full gamut of fiduciary responsibilities should be required of the franchisor. *See Eaton, Yale & Towne, Inc. v. Sherman Industrial Equip. Co.*, 316 F. Supp. 435, 445 (E.D. Mo. 1970). In my view both the district court and

[1] The appellant's objection that the proof of damages offered by the appellee was speculative has merit, but it does not appear that appellant objected to some of the evidence now questioned. Moreover, the jury quite obviously did not accept the calculations of plaintiff's expert. Under these circumstances, I agree with the majority that the jury award may stand if the appellee accepts the remittitur.

the majority erred in deciding this matter; in fact, South Dakota law does not justify the conclusion they reach.

The majority acknowledges (*ante*, slip op. at 18 n.8) that Judge Nichol's instruction on fiduciary duties was based on a New York case that was later reversed. The majority maintains, however, that the instruction properly reflected South Dakota law because of the subsequent enactment there of a comprehensive franchise statute, S.D. Compiled Laws Ann. ch. 37-5A. The majority quotes Judge Nichol as expressly construing that franchise statute as a codification of the common law of South Dakota. *Ante*, slip op. at 18. I do not so read the record.[2]

The South Dakota franchise law contains detailed registration and public disclosure provisions akin to those found in the Securities Act of 1933, 15 U.S.C. §§ 77a-77aa (1976). This scheme of franchise regulation doubtless represents a substantial departure from the common law of South Dakota. But even if the franchise statute reflected existing common law standards applicable to the lease challenged here, the district court's instructions would remain unjustified. The statute merely enjoins unfair or inequitable practices. S.D. Compiled Laws Ann. §§ 37-5A-51 and 37-5A-66(7). It does not establish a fiduciary relationship between franchisor and franchisee or impose a standard of utmost good faith.

The cases cited by the majority go no further than the South Dakota statute. *Shell Oil Co. v. Marinello*, 120

[2] In the passage relied on by the majority, plaintiff's counsel was attempting to explain the New Jersey Superior Court's interpretation of that state's franchise statute in *Shell Oil Co. v. Marinello*, 120 N.J. Super. 357, 294 A.2d 253 (1972), *aff'd*, 63 N.J. 402, 307 A.2d 598 (1973), *cert. denied*, 415 U.S. 920 (1974). Judge Nichol interrupted to observe, "In other words, they were codifying the common law." Plaintiff's counsel replied, "That's exactly right." Judge Nichol then said, "Just as *maybe* South Dakota did when it adopted the Franchise Act, was codifying what was really the law in South Dakota anyway." (Emphasis added.) Plaintiff's counsel responded, "That's exactly what the New Jersey Court said."

N.J. Super. 357, 294 A.2d 253 (1972), *aff'd*, 63 N.J. 402, 307 A.2d 598 (1973), *cert. denied*, 415 U.S. 920 (1974), nowhere mentions the concept of a fiduciary relationship. Rather, the court there simply granted dealer Marinello's prayer for contract reformation by inferring a contractual term that Shell could refuse to renew his franchise (comprising both a lease and a multifaceted dealer agreement) only for good cause. *Atlantic Richfield Co. v. Razumic*, 390 A.2d 736, 743 (Pa. 1978), is to the same effect. Not only do these cases fail to state a general principle of fiduciary duty, but they are also readily distinguishable on their facts from the case at hand. Here Arnott breached the terms of his lease agreement by failing to stay open twenty-four hours a day; in terminating his lease, Amoco was proceeding under a clause permitting termination for cause.[3]

The parties in this case entered into a business relationship, not a fiduciary relationship. Each party served the interests of the other, but each also quite properly sought its own interests. The district court was unwilling to find the terms of their agreement unconscionable. *Cf. Shell Oil Co. v. Marinello*, *supra*, 307 A.2d at 602-03 (striking the disputed termination provision as unconscionable and contrary to public policy). I think that it was unnecessary to go beyond this conclusion, and I believe the court committed error when, on the facts of this case, it instructed the jury that a strict fiduciary relationship existed between Arnott and Amoco.[4]

[3] The evident purpose of the statutory and common law termination requirements * * * is the protection of franchisees who have conscientiously striven to carry out their obligations under the franchise agreement. They were not intended to prevent the severance of those who deliberately disregard reasonable requirements contained in their contract with the franchisor [*Amerada Hess Corp. v. Quinn*, 143 N.J. Super. 237, 362 A.2d 1258, 1267 (1976).]

[4] This error was not made harmless by the context in which it occurred, as the majority suggests. *Ante*, slip op. at 19. The disputed instruction was repeated by the court without benefit of context when, after two hours of deliberations, the jury returned with the question, "Define fiduciary duty."

II. *The Antitrust Claim.*

The majority concludes that Amoco combined to fix vertical prices, a *per se* violation of section 1 of the Sherman Act, 15 U.S.C. § 1 (1976).[5] Having reviewed the record, I believe that there is insufficient evidence to support this conclusion. Specifically, I find no proof of a combination or conspiracy in this case; the contract between Arnott and Amoco was admittedly innocuous. My reading of the record is supported by Judge Nichol's observation at the close of plaintiff's case: "I don't see any evidence of conspiracy or combination in this case * * *[.]" Unlike Judge Nichol, I believe this implicit finding of unilateral activity vitiates Arnott's antitrust claim. *See Quality Mercury, Inc. v. Ford Motor Co.*, 542 F.2d 466, 469 (8th Cir. 1976), *cert. denied*, 433 U.S. 914 (1977).

The record in this case reflects that Arnott usually posted his retail gasoline prices a penny or two above those suggested by Amoco. Such deviations led to "coffee" with Amoco representatives, but no change. In the only direct incident regarding prices recalled by Arnott or his employees, Dick Lucas, field sales manager for Amoco, refused one day to purchase gas from Arnott because he thought it was too expensive. Arnott let his prices stand.[6]

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[5] 15 U.S.C. § 1 provides in pertinent part: "Every contract, combination * * * or conspiracy, in restraint of trade or commerce among the several States, * * * is hereby declared to be illegal[.]"

[6] If I were writing on a clean slate with only the rule of reason for guidance, *see Standard Oil Co. v. United States*, 221 U.S. 1 (1911), I would be hard pressed to find unlawful an actual combination that succeeded in keeping down Arnott's prices. Arnott was, after all, exploiting the modicum of monopoly pricing power that he enjoyed by virtue of his location on an interstate highway.

Arnott testified that, in effect, many of his customers were ignorant of the prices charged by his off-highway competitors. He therefore found it advantageous to raise his prices; demand for his gas was not greatly reduced. Amoco, on the

(Footnote continued on following page)

The majority suggest two theories under which the jury could find a combination or conspiracy in this case: first, that Amoco and Arnott combined when the latter unwillingly complied with Amoco's "pricing directives"; and second, that Amoco combined with other dealers who "acquiesced in the enforced pricing policy." *Ante*, slip op. at 22. Both of these theories are derived from dicta in *Albrecht v. Herald Co.*, 390 U.S. 145, 150 n.6 (1968). Neither one is applicable here.

First, the evidence provides no support for the notion that Arnott unwillingly complied with Amoco's "price directives." "Directives" cannot mean merely Amoco's

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[6] *continued*
other hand, had a direct interest in maintaining the volume of Arnott's sales, in part because his lease payments were based solely on fuel gallonage. *See Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 56 n.24 (1977). Amoco also had an important interest in the pricing reputation of its stations generally. Success in restraining Arnott's prices would have advanced the interests of both Amoco and Arnott's customers, at the same time replicating (with respect to Arnott) the consequences of a fully competitive retail gasoline market. *See Albrecht v. Herald Co.*, 390 U.S. 145, 169 (1968) (Steward, J., dissenting).

The Supreme Court has, however, displaced the rule of reason in cases such as this by making agreements or combinations to fix maximum prices *per se* illegal. *Kiefer-Stewart Co. v. Seagram & Sons*, 340 U.S. 211, 213 (1951); *Albrecht v. Herald Co., supra*, 390 U.S. at 151. *But cf. Continental T.V., Inc. v. GTE Sylvania Inc., supra* (restoring the rule of reason in cases addressing the legality of vertical nonprice restrictions). Notwithstanding the caveat in *Continental T.V.* distinguishing price from nonprice restrictions, *id.* at 51 n.18, the Court's reasoning in that case suggests that the *per se* approach adopted in *Albrecht* may not survive reexamination. *See Continental T.V., Inc. v. GTE Sylvania, Inc., supra*, 433 U.S. at 69-70 (White, J., concurring); Posner, *The Rule of Reason and the Economic Approach: Reflections on the Sylvania Decision*, 45 U. Chic. L.Rev. 1, 12 (1977); Koches, *Developments in the Law of Vertical Nonprice Restrictions: A Welcome Return to the Rule of Reason*, 33 U. Miami L.Rev. 247, 266-68 (1978); Pitofsky, *The Sylvania Case: Antitrust Analysis of Non-Price Vertical Restrictions*, 78 Colum L.Rev. 1, 16 n.59 (1978).

suggested prices: such suggestions, standing alone, were clearly permissible. *Susser v. Carvel Corporation*, 332 F.2d 505, 510 (2d Cir.), *cert. granted*, 379 U.S. 885 (1964), *cert. dismissed as improvidently granted*, 381 U.S. 125 (1965). The majority must be referring more particularly to the conversations over coffee that Arnott had with Amoco representatives when he deviated from the suggested prices. But there is no evidence that Arnott changed his prices as a result of these conversations, or that he thereafter hewed more closely to Amoco's suggested prices. The cited incident with Dick Lucas likewise resulted in no change; Arnott continued to price independently (*i.e.*, generally higher than Amoco's suggested prices) throughout the period of his lease. Hence, in this case no combination existed and no actual fixing of prices occurred. *Cf. Quinn v. Mobil Oil Company*, 375 F.2d 273 (1st Cir.), *cert. dismissed*, 389 U.S. 801 (1967) (affirming dismissal of an antitrust complaint on similar facts).

The panel's second theory is also inapplicable to the facts of this case. Having reviewed the record, I find no substantial evidence of a combination between Amoco and its other dealers. The record simply does not support the majority's characterization of the dealers' behavior as "acquies[cence] in [an] enforced pricing policy." *Ante*, slip op. at 22. In contrast to the fragments of Mrs. Pascoe's testimony quoted by the majority, *ante*, slip op. at 20, nine witnesses who were past or present Amoco lessees (including Greg White) testified that retail gas prices were only suggested by Amoco, that the dealers possessed final authority to set prices, and that this authority was frequently exercised independently. Moreover, not one testified that his lease had been threatened or terminated in retaliation for independence in pricing. *Cf. Umphres v. Shell Oil Company*, 512 F.2d 420, 422 (5th Cir.), *cert. denied*, 423 U.S. 929 (1975) (holding comparable evidence of vertical price fixing to be clearly insubstantial).

Even if a combination with other dealers were shown to exist, I would be loath to hold that it satisfies the statutory requirement of a "combination * * * in

restraint of trade." In fact, any such combination would be wholly irrelevant to the restraint of trade alleged here. *See Albrecht v. Herald Co., supra*, 390 U.S. at 161 (Harlan, J., dissenting). The other dealers in the Sioux Falls area had little or no interest in Arnott's affairs. To the extent that they had an interest, it was not that of Amoco: in all likelihood, the other dealers preferred that Arnott keep his price higher than that suggested, as such a policy might well bring them more customers. *Cf. Harold Friedman, Inc. v. Kroger Co.*, 581 F.2d 1068 (3d Cir. 1978) (finding similarly collateral dealings involving the defendant to be insufficient evidence of concerted activity).

Under either of the majority's theories, Arnott failed to establish the "contract, combination or conspiracy" essential to his Sherman Act claim. Hence, the cases the majority relies upon in finding an antitrust violation are not controlling here. In *Simpson v. Union Oil Co.*, 377 U.S. 13 (1964), plaintiffs challenged retail service station leases that were tied to "consignment" agreements expressly empowering the supplier to set the selling price. The presence of this price-fixing term, the court found, distinguished *Simpson* from *United States v. Colgate & Co.*, 250 U.S. 300 (1919); its enforcement made the "consignment" agreements contracts in restraint of trade. *Simpson v. Union Oil Co., supra*, 377 U.S. at 24. In the case at hand there was no such price-fixing term; indeed, in the only written agreement concerning pricing, Arnott was promised "an absolute right to set [his] own resale prices * * *."[7]

United States v. Parke, Davis & Co., 362 U.S. 29 (1960), is also inapposite. In that case a drug manufac-

[7] To be sure, Arnott alleged that Amoco breached this promise. But the breach of a contract term does not transform the contract, so that what it once promised, it now forbids. Nor can it be argued that price fixing was a term in an implied contract that replaced the fraudulently induced lease agreement; as noted above, Arnott never agreed to such a term. If Amoco sought to fix Arnott's prices, it did so in spite of, not in furtherance of, the terms of their agreement. Theirs was simply not a contract in restraint of trade.

turer was found to have combined not only with acquiescing retailers but also with its wholesalers in order to terminate those retailers that cut prices. Similarly, in *Albrecht v. Herald Co., supra*, 390 U.S. at 149-150, the defendant newspaper publisher was found to have combined with two other persons, including a rival carrier, to force plaintiff to charge only the advertised retail price for his newspapers. In the case at hand, by contrast, Amoco acted unilaterally in terminating Arnott's lease. The other Amoco dealers cannot be said to stand in the position of the wholesalers in *Parke, Davis* or the rival carrier in *Albrecht* because they had no power over Arnott. Amoco therefore could not and did not employ the other dealers as a weapon in its dispute with Arnott.

In sum, I believe that the majority's treatment of fiduciary duties and the antitrust claims in this case is in error. I fear that their approach will also have unfortunate consequences in practice. Arnott clearly breached the express terms of his lease agreement. To limit unduly Amoco's power of termination in circumstances such as these (putting aside the issue of fraud) and to uphold a dubious antitrust claim by the dissatisfied lessee, invites wholesale suppliers to replace their lessees and distributors with employees whose freedom of action will be considerably more restricted. *See Continental T.V., Inc. v. GTE Sylvania Inc., supra*, 433 U.S. at 57 n.26.[8] That is to say, the approach taken by the majority encourages increased concentration in the retail market for gasoline and related products. I consider this to be unwarranted and unfortunate.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

[8] Examples of this process may be found in *Call Carl, Inc. v. BP Oil Corp.*, 554 F.2d 623 (4th Cir.), *cert. denied*, 434 U.S. 923 (1977); *Knutson v. Daily Review, Inc.*, 548 F.2d 795 (9th Cir. 1976), *cert. denied*, 433 U.S. 910 (1977); and *McGuire v. Times Mirror Co.*, 405 F. Supp. 57 (C.D. Cal. 1975).

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 79-1150 September Term, 1979

GEORGE ARNOTT,

Appellee,

vs.

THE AMERICAN OIL COMPANY, a Corporation,

Appellant.

JUDGMENT
[Filed December 10, 1979]

Appeal From the United States District Court for the ..... District of South Dakota.

This Cause came on to be heard on the record from the United States District Court for the ..... District of South Dakota and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court, in this cause, be, and the same is hereby, affirmed in the reduced amount of $125,000.00 plus interest and costs.

[Attestation] December 6, 1979

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 79-1150 September Term, 1979

GEORGE ARNOTT,

Appellee,

vs.

THE AMERICAN OIL COMPANY, a corporation,

Appellant.

JUDGMENT
[Filed December 10, 1979]

Appeal From the United States District Court for the ..... District of South Dakota.

This Cause came on to be heard on the record from the United States District Court for the ..... District of South Dakota and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court, in this cause, be, and the same is hereby, affirmed upon condition that appellee, George Arnott file a remittitur within thirty days hereof of that portion of the judgment in excess of $125,000, plus interest and costs from the date of judgment was entered herein, in accordance with the majority opinion of this Court. Otherwise this cause is remanded for a new trial.

October 24, 1979

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 79-1150 September Term, 1979

GEORGE ARNOTT,

Appellee,

vs.

THE AMERICAN OIL COMPANY, etc.,

Appellant.

Appeal from the United States District Court
for the District of South Dakota.

ORDER
[Filed December 3, 1979]

The Court having considered petition for rehearing en banc filed by counsel for appellant and, being fully advised in the premises, it is ordered that the petition for rehearing en banc be, and it is hereby, denied.

Considering the petition for rehearing en banc as a petition for rehearing, it is ordered that the petition for rehearing also be, and it is hereby, denied.

[Notice of Entry] November 29, 1979

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 79-1150 September Term, 1979

GEORGE ARNOTT,

Appellee,

vs.

THE AMERICAN OIL COMPANY, etc.,

Appellant.

Appeal from the United States District Court
for the District of South Dakota.

ORDER
[Filed December 3, 1979]

Petition of appellee for rehearing filed in this cause having been considered, it is now here ordered by this Court that the same be, and it is hereby, denied.

[Notice of Entry] November 29, 1979

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

GEORGE ARNOTT,

Plaintiff,

Civ. No. 74-4035 vs.

THE AMERICAN OIL COMPANY, a Corporation,

Defendant.

ORDER DENYING MOTION FOR JUDGMENT
NOTWITHSTANDING THE VERDICT
OR, IN THE ALTERNATIVE,
A NEW TRIAL OR TO AMEND JUDGMENT
[Filed January 4, 1979]

This matter having come before the Court upon motion of the Defendant, The American Oil Company, for judgment notwithstanding the verdict or, in the alternative, a new trial or to amend judgment, and upon a careful consideration of the briefs and argument of counsel, and the Court being fully advised in the premises,

It Is Hereby Ordered that said motions are hereby denied.

Dated at Sioux Falls, South Dakota, this 4th day of January, 1979.

By The Court:
/s/ Fred J. Nichol
Chief Judge

[Attestation and Notice of Entry]

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

GEORGE ARNOTT,

Plaintiff,

Civ. No. 74-4035 vs.

THE AMERICAN OIL COMPANY, a Corporation,

Defendant.

MEMORANDUM DECISION

Messrs. Michael F. Pieplow and Edwin E. Evans, of Davenport, Evans, Hurwitz & Smith, of Sioux Falls, South Dakota, appeared in behalf of the plaintiff;

Mr. Timothy J. Nimick, of Woods, Fuller, Shultz & Smith, of Sioux Falls, South Dakota, and Mr. Maurice Glover, of Chicago, Illinois, appeared in behalf of the defendant.

The defendant makes this motion for a judgment notwithstanding the verdict or in the alternative for a new trial or to amend the judgment after a jury verdict in favor of the plaintiff.

The defendant predicates this motion on his view of the "facts." All of the defendant's points were raised earlier. They were argued and briefed thoroughly in connection with pretrial motions, trial briefs and motions, proposed instructions refused, objections to instructions given, and the motions for directed verdicts. The court is of the same opinion that it expressed earlier, that a jury question was raised and that the defendant was not entitled to a directed verdict.

The motions for judgment notwithstanding the verdict or in the alternative for a new trial or to amend the judgment are denied.

Done and entered at Sioux Falls, South Dakota, this 18th day of December, 1978.

By The Court:
/s/ Fred J. Nichol
Chief Judge

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

GEORGE ARNOTT,

Plaintiff,

Civ. No. 74-4035 vs.

THE AMERICAN OIL COMPANY, a Corporation,

Defendant.

JUDGMENT
[Filed September 7, 1978]

This action came on for trial before the Court and a jury, the Honorable Fred J. Nichol, District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict in favor of the Plaintiff, George Arnott, and against the Defendant, The American Oil Company, and the jury further having answered all interrogatories submitted to it in the affirmative, thereby finding in favor of said Plaintiff and against said Defendant on all theories of recovery submitted to it,

It Is Hereby Ordered And Adjudged that the Plaintiff recover of the Defendant threefold the sum of One Hundred Thousand Dollars ($100,000.00), for a total of Three Hundred Thousand Dollars ($300,000.00), all as provided under Section 4 of the Clayton Act 15 U.S.C. §15, with interest thereon as provided by law, and a reasonable attorney's fee in the sum of $7,595.70, said sum to be determined and approved by the Court at a later date and inserted herein, and his costs of action in the amount of $704.64, said sum to be determined by the Clerk and inserted herein at a later date.

It Is Further Ordered And Adjudged that the Plaintiff recover of the Defendant the sum of Twenty-five Thousand Dollars ($25,000.00) punitive damages, with interest thereon at the rate provided by law.

Dated at Sioux Falls, South Dakota, this 7th day of September, 1978.

By The Court:
/s/ Fred J. Nichol
Chief Judge

[Attestation]

NOTICE OF ENTRY

Take notice that the original of this copy was filed and entered in the office of the Clerk of the United States District Court for the District of South Dakota on the 7th day of September, 1978.

/s/ William J. Sratha
Clerk
DN

Judgment now contains Attorney's fee figure entered 1-15-79 as directed by Order of Court.

DN

Dated: 1-15-79

LEGISLATIVE HISTORY OF
SOUTH DAKOTA FRANCHISE ACT

ORIGINAL SENATE BILL NO. 210

STATE OF SOUTH DAKOTA

Forty-Ninth Session, Legislative Assembly, 1974

SENATE BILL NO. 210

Introduced by: Senators Kandaras, Mahan, O'Connor, Jackson, Novotny, Hall, and Representatives Linda Lea Miller, Knutson, Kolbo, Hersrud and Curran

FOR AN ACT ENTITLED, An Act regulating the offer and sale of franchises and providing penalties for violations therefore.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF SOUTH DAKOTA:

Section 1. Terms used in this Act, unless the context clearly otherwise requires, mean:

(1) "Advertisement," any written or printed communication or any communication by recorded telephone message, radio, television, picture or similar means published in connection with a sale of, or offer to sell, any franchise;

(2) "Director," the director of the division of securities;

(3) "Franchise," a contract or agreement, either express or implied, whether oral or written, for a definite or indefinite period, between two or more persons;

[page 2 of original bill]

(a) by which a franchisee is granted the right to engage in the business of offering or dis-

tributing goods or services using the franchisor's trade name, trademark, service mark, logotype, advertising, or other commercial symbol of related characteristics;

(b) in which the franchisor and franchisee have a community of interest in the marketing of goods or services at wholesale, retail, by lease, agreement or otherwise; and

(c) for which the franchisee is required to pay, directly or indirectly, a franchise fee.

[13]* Franchise does not include any business which is operated under [14] a lease on the premises of the lessor as long as such business [15] is incidental to the business conducted by the lessor on such [16] premises, including, without limitation, leased departments [17] and concessions. Notwithstanding anything in this Act to [18] the contrary, franchise shall include a contract, lease or [19] other agreement whereby the franchisee is granted the right [20] to market motor vehicles or motor vehicle fuel;

(4) "Franchisee," a person to whom a franchise is granted. Unless otherwise stated herein, franchisee shall also include a subfranchisor;

(5) "Franchisor," a person who grants a franchise or an area franchise.

(6) "Area franchise," any contract or agreement between a franchisor and a subfranchisor whereby the subfranchisor is granted the right, for consideration given in whole or in part for such right, to sell or negotiate the sale of franchises in the name or in behalf of the franchisor. Unless specifically stated otherwise, "franchise" includes "area franchise";

(7) "Subfranchisor," a person to whom an area franchise is granted;

---

* Lines as numbered in original bill. This paragraph amended and enacted as SDCL 37-5A-2.

(8) "Franchise fee," any fee or charge that a franchisee or subfranchisor is required to pay or agrees to pay for the right to enter into a business or to continue a business under a franchise agreement, including, but not limited to, the payment either in lump sum or by installments of an initial capital investment fee, any fee or charges based upon a percentage of gross or net sales whether or not referred to as royalty fees, any payment for goods or services, or any training fees or training school fees or charges; provided, however, that the following shall not be considered the payment of a franchise fee:

(a) The purchase of goods or agreement to purchase goods at a bona fide wholesale price;

(b) The purchase of goods or agreement to purchase goods on consignment, if the proceeds remitted by the franchisee from any such sale shall reflect only the bona fide wholesale price of such goods;

(c) The repayment by the franchisee of a bona fide loan made to the franchisee from the franchisor;

(d) The purchase of goods or agreement to purchase goods at a bona fide retail price subject to a bona fide commission or compensation plan that in substance reflects only a bona fide wholesale transaction;

(e) The purchase, at their fair market value, of supplies or fixtures or an agreement to purchase supplies or fixtures necessary to enter into the business or to continue the business under the franchise agreement;

(f) The purchase or lease, at the fair market value, of real property or an agreement to so purchase or lease real property necessary to enter into the business or to continue the business under the franchise agreement;

(9) "Fraud and deceit" are not limited to common law fraud and deceit;

(10) "Order," a consent, authorization, approval, prohibition or requirement, or other order applicable to a specific case, issued by the director;

(11) "Person," means a natural person, corporation, partnership, trust, or other legal entity;

(12) "Publish," publicly to issue or circulate by newspaper, mail, radio, or television, or otherwise to disseminate to or place before the public;

(13) "Rule," any published rule or regulation adopted by the director in accordance with chapter 1-26;

(14) "Sale" or "sell," every contract or agreement for sale of, and every contract to sell or dispose, of a franchise or interest in a franchise, for value;

(15) "Offer" or "offer to sell," every attempt to offer to dispose of, and every solicitation of an offer to buy, a franchise or interest in a franchise for value;

(16) "Affiliated company," any company owned or controlled by a person to whom affiliation is attributed, any controlling parent company or controlled subsidiary of such person, any controlled subsidiary of a controlling parent company of such person and any other company or person owned or controlled by the same person or persons who own or control the person to whom affiliation is attributed.

Section 2. No person may offer or sell any franchise in this state unless there is an effective registration statement on file in accordance with the provisions of this Act or unless the franchise or transaction is exempted under section 3 of this Act.

Section 3. The registration requirement imposed by section 2 of this Act shall not apply to the following:

(1) The offer or sale by a franchisee of a franchise owned by him, or the offer or sale by a subfranchisor of the entire area franchise owned by him

if the sale is not effected by or through a franchisor; provided, however, that no person shall make more than one sale during any period of twelve consecutive months of a franchise or area franchise granted by a single franchisor. A sale is not effected by or through a franchisor merely because a franchisor has a right to approve or disapprove a different franchisee;

(2) Any transaction by an executor, administrator, sheriff, receiver, trustee in bankruptcy, guardian or conservator;

(3) Any offer or sale to a banking organization, financial organization or life insurance corporation within the meanings given these terms by §§ 51-1, 52-1, and 58-1; or

(4) Securities currently registered in this state pursuant to chapter 47-31.

Section 4. An application for registration of a franchise shall be made by filing with the director a proposed public offering statement accompanied by a fee of one hundred dollars. The public offering statement shall contain the items required by section 5 to 14, inclusive of this Act, as well as:

(1) The name of the franchisor, the name, trade name, and trademark and service mark under which the franchisor is doing or intends to do business, and the name of any parent or affiliated company that will engage in business transactions with franchisees;

(2) The franchisor's principal business address, the address of its agent in this state authorized to receive service of process, and a consent to service of process as required by section 60

* * *

MR. PRESIDENT:

The Committee on Commerce respectfully report that they have had under consideration Senate Bill No. 210.

And return the same with the recommendation that said bill be amended as follows:

On page 2, line 17 of the printed bill strike everything after the period, and strike all of lines 18, 19 and 20.

On page 8 of the printed bill between lines 13 and 14 insert the following: "(5) All franchisors who have a net worth of $10,000,000.00 or more and have had at least twenty-five franchises in operation in the United States for the last twenty-five years."

And that as so amended said bill do pass.

Respectfully submitted,

CHARLES E. DONNELLY, JR.
Chairman.

MR. PRESIDENT:

The Committee of Conference respectfully report that they have had under consideration Senate Bill No. 210 and the amendments thereto made by the House, and the disagreement of the two Houses thereon, and recommend that on page 854 of the Senate Journal, following the line numbered 6, insert the following:

(6) Motor vehicles, motorcycles or farm implement franchises.

Respectfully submitted,

HOMER KANDARAS
JACOB J. KRULL
TOM MILLS
Committee on part of the Senate.

LINDA LEA MILLER
GENE ROBBENNOLT
JAMES S. NELSON
Committee on part of the House.

Mr. Kandaras moved that the report of the Committee of Conference on House Bill No. 210 be adopted.

The question being, "Shall the Senate adopt the report of the Committee of Conference on Senate Bill No. 210?"

And the roll being called:

There were Yeas 29

There were Nays 0

Absent and Not Voting 0

Excused 6

Those voting Yea were:

Anderson, L.	Leddy	Riedy
Austad	Larew	Ripp
Bierle	Mayer	Roberts
Brown	Mickelson	Schroder
Dunn	Miller	Sperry
Grams	Mills	Spiry
Hall	Novotny	Sutton
Jones	Pieplow	Traak
Kandaras	Poppen	Wollman
Krull	Quintal	

Those Excused were:

Anderson, B.	Harding	Mahan
Donnelly	Jackson	O'Connor

So the motion having received an affirmative vote of a majority of the Members-elect, Mr. President declared the motion prevailed and the report of the Committee on Conference on House Bill No. 210 was adopted.

REPORT OF CONFERENCE COMMITTEE

The Committee of Conference on Senate Bill No. 210 submitted the following report:

MR. SPEAKER:

The Committee of Conference respectfully report that they have had under consideration Senate Bill No. 210 and the amendments thereto made by the House, and the disagreement of the two Houses thereon, and recommend that on page 554 of the Senate Journal, following the line numbered 6, insert the following:

(6) Motor vehicles, motorcycles, or farm implement franchises.

Respectfully submitted,

LINDA MILLER
GENE ROBBENOLT
JAMES S. NELSON
Committee on part of the House

HOMER KANDARAS
JACOB J. KRULL
TOM MILLS
Committee on part of the Senate

Mrs. L. Miller moved that the Report of the Conference Committee on Senate Bill No. 210 be adopted.

The question being on Mrs. Miller's motion.

And the roll being called:

There were Yeas 82

There were Nays 1

SHERMAN ANTITRUST ACT
Section 1, 15 U.S.C. §1 (1970)

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal.

THE RULES OF DECISION ACT
28 U.S.C. §1652

§ 1652. *State laws as rules of decision*

The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

SOUTH DAKOTA COMPILED LAWS (SDCL)

SDCL 53-3-5. Assumption of obligation by acceptance of benefits. A voluntary acceptance of a transaction is equivalent to a consent to all the obligations arising from it insofar as the facts are known or ought to be known to the person accepting.

SDCL 57-7-37. Delay or nondelivery of goods excused by failure of presupposed condition.—Except so far as a seller may have assumed a greater obligation and subject to §§57-7-35 and 57-7-36 on substituted performance, delay in delivery or nondelivery in whole or in part by a seller who complies with §§57-7-38 and 57-7-39 is not a breach of his duty under a contract for sale if performance as agreed has been made impracticable by the occurrence of a contingency the nonoccurrence of which was a basic assumption on which the contract was made or by compliance in good faith with

any applicable foreign or domestic government regulation or order whether or not it later proves to be invalid.

SDCL 57-7-38. Allocation of deliveries of goods—Except so far as a seller may have assumed a greater obligation and subject to §§57-7-35 and 57-7-36 on substituted performance, where the causes mentioned in §57-7-37 affect only a part of the seller's capacity to perform, he must allocate production and deliveries among his customers but may at his option include regular customers not then under contract as well as his own requirements for further manufacture. He may so allocate in any manner which is fair and reasonable.

SDCL 57-7-39. Delay or nondelivery of goods—Notice from seller to buyer.—Except so far as a seller may have assumed a greater obligation and subject to §§57-7-35 and 57-7-36 on substituted performance, the seller must notify the buyer reasonably that there will be delay or nondelivery and, when allocation is required under §57-7-38 of the estimated quota thus made available for the buyer.

SDCL 57-7-40. Buyer's remedy on claim of excuse for indefinite delay of delivery of goods—Allocation of deliveries.—Where the buyer receives notification of a material or indefinite delay or an allocation justified under §§57-7-37 to 57-7-39, inclusive, he may by written notification to the seller as to any delivery concerned, and where the prospective deficiency substantially impairs the value of the whole contract under the provisions of this chapter relating to breach of installment contracts (§§57-7-31 to 57-7-33, inclusive), then also as to the whole,

(1) Terminate and thereby discharge any unexecuted portion of the contract; or

(2) Modify the contract by agreeing to take his available quota in substitution.

SDCL 57-7-41. Notice from seller of delay or nondelivery of goods—Failure of buyer to modify contract—Lapse of contract.—If after receipt of such notification from the seller the buyer fails so to modify the contract within a reasonable time not exceeding thirty days the contract lapses with respect to any deliveries affected.

SDCL 57-7-42. Remedy of buyer on claim of excuse for delay or nondelivery of goods—Negation by agreement.—The provisions of §§57-7-40 and 57-7-41 may not be negated by agreement except insofar as the seller has assumed a greater obligation under §§57-7-37 to 57-7-39, inclusive.

SOUTH DAKOTA BULK SALES ACT

SDCL 57-24-16. List of creditors—Signing—Verification—Contents.—The list of creditors must be signed and sworn to or affirmed by the transferor or his agent. It must contain the names and business addresses of all creditors of the transferor, with the amounts when known, and also the names of all persons who are known to the transferor to assert claims against him even though such claims are disputed. If the transferor is the obligor of an outstanding issue of bonds, debentures or the like as to which there is an indenture trustee, the list of creditors need include only the name and address of the indenture trustee and the aggregate outstanding principal amount of the issue.

SDCL 57-24-18. Notice to creditors required.—In addition to the requirements of §§ 57-24-15 to 57-24-17, inclusive, any bulk transfer subject to this chapter except one made by auction sale (§§ 57-24-25 to 57-24-28, inclusive) is ineffective against any creditor of the transferor unless at least ten days before he takes possession of the goods or pays for them, whichever happens first, the transferee gives notice of the transfer in the manner and to the persons hereafter provided (§§57-24-22 to 57-24-24, inclusive).

SOUTH DAKOTA FRANCHISE ACT

as signed into law, February 1974,
SDCL, ch. 37-5A, §§1-4

37-5A-1. Franchises subject to chapter. As used in this chapter, unless the context clearly requires otherwise, "franchise" means contract or agreement, either express or implied, whether oral or written, for a definite or indefinite period, between two or more persons:

(1) By which a franchisee is granted the right to engage in the business of offering or distributing goods or services using the franchisor's trade name, trademark, service mark, logotype, advertising, or other commercial symbol of related characteristics;

(2) In which the franchisor and franchisee have a community of interest in the marketing of goods or services at wholesale, retail, by lease, agreement or otherwise; and

(3) For which the franchisee is required to pay, directly or indirectly, a franchise fee.

37-5A-2. Business operated on leased premises not a franchise. As used in this chapter, the term "franchise" does not include any business which is operated under a lease on the premises of the lessor as long as such business is incidental to the business conducted by the lessor on such premises, including, without limitation, leased departments and concessions.

37-5A-3. Required payments constituting franchise fees. As used in this chapter, unless the context clearly requires otherwise, "franchise fee" means any fee or charge that a franchisee or subfranchisor is required to pay or agrees to pay for the right to enter into a business or to continue a business under a franchise agreement, including, but not limited to, the payment either in lump sum or by installments of an initial capital investment fee, any fee or charges

based upon a percentage of gross or net sales whether or not referred to as royalty fees, any payment for goods or services, or any training fees or training school fees or charges.

37-5A-4. Transactions not considered franchise fees. Notwithstanding §37-5A-3, the following shall not be considered the payment of a franchise fee:

(1) The purchase of goods or agreement to purchase goods at a bona fide wholesale price;

(2) The purchase of goods or agreement to purchase goods on consignment, if the proceeds remitted by the franchisee from any such sale shall reflect only the bona fide wholesale price of such goods;

(3) The repayment by the franchisee of a bona fide loan made to the franchisee from the franchisor;

(4) The purchase of goods or agreement to purchase goods at a bona fide retail price subject to a bona fide commission or compensation plan that in substance reflects only a bona fide wholesale transaction;

(5) The purchase, at their fair market value, of supplies or fixtures or an agreement to purchase supplies or fixtures necessary to enter into the business or to continue the business under the franchise agreement;

(6) The purchase or lease, at the fair market value, of real property or an agreement to so purchase or lease real property necessary to enter into the business or to continue the business under the franchise agreement.

Supreme Court, U. S.
FILED
APR 4 1980
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1980

No. 79-1357

THE AMERICAN OIL COMPANY,

Petitioner,

vs.

GEORGE ARNOTT,

Respondent.

BRIEF IN RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

DAVENPORT, EVANS, HURWITZ
& SMITH
MICHAEL F. PIEPLOW
EDWIN E. EVANS
National Reserve Building
Sioux Falls, South Dakota

Attorneys for Respondent
George Arnott

April 2, 1980

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

No. 79-1357

THE AMERICAN OIL COMPANY,

Petitioner,

vs.

GEORGE ARNOTT,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION

Respondent, George Arnott ("Arnott"), respectfully requests that the Petition for Writ of Certiorari seeking review of the opinion and judgment of the Court of Appeals for the Eighth Circuit be denied.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 609 F.2d 873 (8th Cir. 1979) and is set out in Petitioner's Appendix 1a-36a. The order denying rehearing en banc is set out in Petitioner's Appendix 39a. The judgment of the District Court is set out in Petitioner's

Appendix 43a-44a.

JURISDICTION

Petitioner, The American Oil Company ("Amoco"), seeks to invoke the jurisdiction of this Court under 28 U.S.C. §1254(1). Arnott believes that the petition herein is untimely. The Court of Appeals' judgment of which review is sought was entered October 24, 1979. Amoco's petition for rehearing was denied November 29, 1979 (Petitioner's Appendix 39a). Ninety-seven days later, on March 5, 1980, the Petition for Writ of Certiorari was filed.

QUESTIONS PRESENTED

I. Whether the Petition for Writ of Certiorari was filed in a timely manner.

II. Whether the District Court and Court of Appeals erred in finding that the jury verdict of fraudulent misrepresentation under South Dakota law was supported by substantial evidence.

III. Whether the District Court committed prejudicial error in instructing the jury that the fiduciary relationship existed between Amoco and its dealer Arnott under South Dakota law.

IV. Whether the District Court and Court of Appeals erred in finding that the jury verdict of a price-fixing combination in violation of the Sherman Act, 15 U.S.C. §1, was supported by substantial evidence.

V. Whether the Court of Appeals erred in finding that the evidence amply supported the compensatory damage award of the jury in the sum of $100,000.00 on any of the three counts of fraudulent misrepresentation, breach of fiduciary duty, and violation of anti-trust laws.

VI. Whether the Court of Appeals erred in setting aside the anti-trust treble damage award and in refusing to make an award of attorney's fees.

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

The jury found, in answer to special interrogatories, Amoco guilty of (1) fraudulent misrepresentation, (2) breach of fiduciary duty, and (3) retail price-fixing in violation of the anti-trust laws. The first two issues involve solely South Dakota law. See Petitioner's Appendix 53a-57a. The price-fixing claim is based upon Section 1 of the Sherman Act, 15 U.S.C. §1, which provides:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal.

STATEMENT OF THE CASE

This action involves the relationship between a major oil company, Amoco, and Arnott, one of its service station dealers. On August 6, 1973, Amoco terminated Arnott

as a Standard Oil dealer by terminating his lease and evicting him from his service station. The jury found in answer to special interrogatories that (1) Amoco was guilty of false and fraudulent misrepresentations regarding the conditions and duration of the service station lease agreement; (2) Amoco breached the fiduciary duty owed to dealer Arnott by terminating his lease for his refusal to agree to fix the retail price of gasoline, for his refusal to purchase and display tires, batteries and accessories ("TBA") only from Amoco, and for his refusal to participate in certain promotional and merchandising activities during the term of the lease agreement; (3) Amoco was guilty of a retail price-fixing combination in violation of Section 1 of the Sherman Act.

The statement of facts in Amoco's Petition sets out only those facts favorable to itself and totally ignores the overwhelming evidence in the record supportive of the jury verdict. Amoco seeks to avoid the well-established rule that the evidence and all reasonable inferences therefrom must be viewed in a light most favorable to the jury verdict. The facts are set forth in detail in the Eighth Circuit opinion and need not be repeated herein. Accordingly, Arnott simply refers this Court to the factual statement set out by the Court of Appeals. See Petitioner's Appendix 1a-8a; 609 F.2d 873-879.

REASONS WHY THE WRIT SHOULD BE DENIED

I.
THE ISSUES SOUGHT TO BE RAISED BY PETITIONER ARE NOT OF SUFFICIENT SCOPE OR

IMPORTANCE TO WARRANT REVIEW BY THIS COURT

None of the usual factors that might impel this Court to review the decision below are present. No questions of constitutional or federal statutory law are raised; nor is there any conflict among the Court of Appeals; nor are the issues involved likely to be reoccurring. Rather, this is a diversity case that turns entirely upon the unique facts of this case. In light of the remittitur filed by Arnott relating to the price-fixing claim, only questions of state law remain at issue, and no one, other than the litigants themselves, will be affected by the outcome. Even the anti-trust issue involves only the question of sufficiency of the evidence to support the jury verdict.

Further review by this Court would only involve the examination of proper evidentiary rulings, of proper jury instructions, and of findings derived from a complex factual setting. In essence, Amoco seeks a fourth review of the sufficiency of the evidence in the lengthy trial record already reviewed once by the District Court and twice by the Court of Appeals. As this Court has oft repeated: "We do not grant certiorari to review evidence and discuss specific facts." United States v. Johnson, 268 U.S. 220, 227 (1925).

II.
IN ANY EVENT, THE COURT OF APPEALS GAVE FULL CONSIDERATION TO THE ISSUES RAISED BY AMOCO AND DECIDED THEM CORRECTLY

Amoco raised a multitude of issues before the Court of Appeals. In its 40

page decision, the Eighth Circuit reviewed each issue fully and in detail. The well-reasoned opinion speaks for itself and need not be repeated herein. Suffice it to say that the Eighth Circuit addressed each of the arguments raised by Amoco and properly rejected them as without support in the record or at law.

The Eighth Circuit specifically held that the jury findings of fraudulent misrepresentation, breach of fiduciary duty, and violation of anti-trust laws were all supported by substantial evidence and that the jury was properly instructed on these issues. The Eighth Circuit further held that the evidence amply supported the $100,000.00 compensatory damage award on any of the three counts. The underlying basis for this decision was that the sole evidence of damages offered at trial was the same on all three counts -- loss of future profits. Accordingly, Amoco must show prejudicial error with reference to all three counts before it is entitled to a new trial.

III.
THE PETITION FOR WRIT OF CERTIORARI WAS FILED UNTIMELY

The opinion and judgment of the Court of Appeals was filed October 24, 1979. (Petitioner's Appendix 1a). Amoco's petition for rehearing was denied November 29, 1979. (Petitioner's Appendix 39a). Amoco's Petition for Writ of Certiorari was not filed until March 5, 1980, a period of 97 days after its petition for rehearing was denied. While it is true that the Court of Appeals entered a second judgment on December 6, 1979, that judgment only acknowledged receipt of Arnott's

remittitur. Amoco's appeal was not from this later judgment accepting the Arnott remittitur. The judgment sought to be reviewed was filed earlier on October 24, 1979, and the petition for rehearing of that judgment was denied November 29, 1979. Accordingly, Amoco's petition was not filed in a timely manner, and it should be dismissed.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that the Petition for Writ of Certiorari should be denied.

Dated at Sioux Falls, South Dakota, this 2nd day of April, 1980.

Respectfully submitted,

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